IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 75-1439

JERRY LEE SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

AMICI CURIAE BRIEF OF THE AMERICAN LIBRARY ASSOCIATION AND THE IOWA LIBRARY ASSOCIATION IN SUPPORT OF PETITIONER.

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INTEREST OF THE AMERICAN LIBRARY ASSOCIATION AND THE IOWA LIBRARY ASSOCIATION.[1]

The American Library Association, founded in 1876, is a nonprofit educational organization with its principal place of business in Chicago, Illinois. Its membership includes more than 34,000 libraries, library trustees and members of the public devoted to the development of library services in the United States. The Association is the chief spokesman for the library movement in North America and, to a considerable extent, throughout the world. Through its membership and its affiliate state library assocations, the American Library Association

1. Letters evidencing the consents of petitioner and the United States to the filing of this amici curiae brief have been lodged in the Clerk's Office.

represents more than 29,000 public, university and special libraries, 90,000 elementary and secondary schools and media centers and 120,000 librarians. The Iowa Library Association has 1,695 members representing the interests of member libraries, librarians, trustees and friends.

This case involves a criminal conviction by a federal jury for a wholly intrastate distribution of allegedly "obscene" materials through the United States mail; yet that distribution was lawful in the state in which it took place. This Court has ruled that the "obscenity" of materials must be measured by local community standards. Hence, the specific issue presented here is whether the conscious determination of a state legislature—that contemporary community standards in that state do not prohibit the distribution of arguably "obscene" materials to consenting adults—can be nullified by the subjective views of federal jurors. The larger issue, however, involves the constitutional propriety of criminally prosecuting a person prior to any notice that the material he distributed has been judicially determined "obscene."

The interest of the American and the Iowa Library Associations in this case relates to this broader issue. This interest reflects their continuing concern over the impact of "obscenity" regulations on the First Amendment rights of libraries and librarians, publishers, authors and the people they serve.[2]

The American library is an institution unique to American culture and tradition. Through libraries, citizens are provided essentially free access to books, periodicals, magazines, pamphlets, records, films, microfilms and other materials which they desire or require to satisfy their intellectual, emotional, recreational or professional interests. In providing this service in the free society mandated by our Constitution, it is and

2. In furtherance of this concern, the American Library Association has previously filed amicus curiae briefs in "obscenity" cases before the Court. See, *e.g.*, *Hamling* v. *United States*, 418 U. S. 87 (1974); *Jenkins* v. *Georgia*, 418 U. S. 153 (1974); *Miller* v. *California*, 413 U. S. 15 (1973).

has been the responsibiliity of libraries to make available books and other materials presenting all points of view probing contemporary problems, issues and attitudes. Consequently, libraries and librarians have historically resisted efforts to limit their collections to only those materials reflecting attitudes, ideas or literary styles bearing the imprimatur of governmental approval or the favor of a majority of the populace. As a result, the American library has become, in many respects, the Nation's most basic First Amendment institution. Indeed, libraries serve as a primary resource for the intellectual freedom required for the preservation of a free society and a creative culture.

This function—as guardians of the freedom to read—cannot be fulfilled if libraries and librarians are threatened with the prospects of criminal prosecutions. Yet the ruling of the Eighth Circuit Court of Appeals challenged here directly raises such prospects. Library collections usually include works having sexual content which might be deemed "obscene" under some standard. The well-recognized "sexual revolution" has been reflected in current literature and periodicals. The public's interest in sexual matters makes it logical and necessary for libraries to have materials with sexual content. Some of these materials, such as sex education books, are quite explicit. These works are frequently transmitted through the United States mail in connection with interlibrary loans.

Hence, under the Court of Appeals' decision, a librarian located in a state that has chosen to decriminalize the distribution of "obscenity" may be prosecuted under federal law. But that librarian has no basis for determining what will be "obscene" in those circumstances. Even the ready availability of hard core pornography in the community in which the library is located provides no guidance. Thus, a librarian could place *Catch-22*, *Manchild in the Promised Land*, *Portnoy's Complaint*, *Joy of Sex* or *Everything You Always Wanted to Know About Sex* on his shelves, and then discover, for the first time in the context of his criminal prosecution, that these books are deemed "obscene" by federal jurors.

This brief is submitted to persuade the Court, in its review of this case, to recognize that statutory schemes, which regulate the distribution of "obscenity" through criminal prosecutions prior to any judicial determination of the "obscenity" of the materials distributed, do not simply impact "smut peddlers"; they seriously curb the First Amendment rights of persons, like librarians. engaged in the distribution of constitutionally protected materials to the public.

Amici respectfully submit that the Court should adopt a requirement that *no criminal "obscenity" prosecution can commence prior to notice of a judicial determination in a civil proceeding that the material is "obscene"*. That proceeding should take place in an adversary context, with a right to prompt review, and the material should be measured under the prevailing standards in the applicable local community in which the distribution would have its impact. Such an approach harmonizes the competing interests of protecting First Amendment rights while, at the same time, permitting the local community to "[stem] the tide of commercialized obscenity."[3] This prior in rem procedure approach is the practical solution to the "intractable obscenity problem"[4] which has long besieged this Court.

3. *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 57 (1973).

4. *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U. S. 676, 704 (1968) (Harlan, J., concurring and dissenting).

ARGUMENT.

NO CRIMINAL "OBSCENITY" PROSECUTION SHOULD BE PERMITTED UNTIL THERE HAS BEEN A PRIOR JUDICIAL DETERMINATION IN A CIVIL PROCEEDING THAT THE MATERIAL IS "OBSCENE."

A. The Absence of a Prior Civil Proceeding Makes Any Concept of "Obscenity" Inherently Vague.

The result in this case confirms the need for a prior civil proceeding focused on the "obscenity" of a work as a constitutionally mandated prerequisite to any criminal prosecution for its distribution. Jerry Lee Smith was convicted and sentenced to jail notwithstanding the fact that his distribution of materials was lawful in the state in which it took place. Such a result is fundamentally at odds with the First Amendment and due process of law, as it manifests all the evils that the void for vagueness doctrine was designed to cure.

Laws are vague and, therefore, invalid, if they (1) do not provide the public with fair notice of what is prohibited, (2) are subject to arbitrary enforcement and application or (3) infringe on the exercise of protected rights. *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972); *Gooding* v. *Wilson*, 405 U. S. 518 (1972); *Papachristou* v. *City of Jacksonville*, 405 U. S. 156 (1972); *Coates* v. *City of Cincinnati*, 402 U. S. 611 (1971); *Winters* v. *New York*, 333 U. S. 507 (1948). As stated in *Grayned* v. *City of Rockford, supra*, 408 U. S. at 108-09:

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to

> be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to '"steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.'" [Footnotes omitted.]

Statutes that affect the area of First Amendment rights are particularly vulnerable to attack for vagueness; indeed, the "standards of permissible statutory vagueness are strict in the area of free expression." *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 432 (1963). The Court has imposed these strict standards because it recognizes that "the freedoms of expression . . . are vulnerable to gravely damaging yet barely visible encroachments." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 66 (1963).

Under these standards, an approach to the regulation of "obscenity" which permits a criminal prosecution prior to a judicial determination in a civil proceeding that the material distributed is "obscene" is necessarily invalid. This fact is clear from the result below and becomes particularly self-evident when the impact of such a procedure upon libraries and librarians is considered.[5]

5. Libraries and librarians are not engaged in the "crass commercial exploitation of sex," *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 63 (1973), that has concerned the Court. See also *id.* at 57, 63, 64, 68; *Miller* v. *California*, 413 U. S. 15, 36 (1973). Nonetheless, the federal statute at issue here—18 U. S. C. § 1461—clearly applies, as do most other "obscenity" statutes, to libraries and librarians in their distribution of reading and other materials to the public. As demonstrated herein, the impact of these statutes on libraries and librarians is substantial, and ominous, for the continued free and robust dissemination of ideas.

1. The Concept of "Obscenity" Does Not Provide Fair Notice of What Is Prohibited.

To satisfy the requirements of due process of law, a criminal statute must be sufficiently definite in its description of what is prohibited to allow a person of reasonable intelligence to determine how to conduct himself. As stated in *United States* v. *Harriss*, 347 U. S. 612, 617 (1954):

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." [Footnote omitted.]

See also *Rabe* v. *Washington*, 405 U. S. 313, 315-16 (1972) (per curiam).

As this Court has recognized, "obscenity . . . is not merely a generic or descriptive term, but a legal term of art," *Hamling* v. *United States*, 418 U. S. 87, 118 (1974), and the line between the "obscene" and the "nonobscene" is admittedly "elusive," *Stanley* v. *Georgia*, 394 U. S. 557, 566 (1969). Cf. *Miller* v. *California*, 413 U. S. 15, 24 (1973). What appeals to prurient interests, is offensive or lacks serious value depends upon the viewer or reader. A given work may appeal exclusively to the prurient interests of one person, be offensive to another, yet have serious scientific or artistic value for a third. This inherent "elusiveness" of the legal definition of "obscenity" is accentuated by the Court's ruling that the legal question of "obscenity" can only be established by a trier of fact applying the contemporary community standards of the "average person" in that community. *Miller* v. *California*, *supra*, 413 U. S. at 30.

Therefore, a distributor of materials, such as a librarian, is directed to evaluate his conduct with reference to the contemporary standards of the "average person" in the local community. But which local community standard applies? Many

libraries serve several communities, including combinations of urban and suburban communities and communities in different states. Furthermore, libraries indirectly serve dispersed and diverse communities through interlibrary loans.

While this Court has recognized the right of state legislatures to set statewide standards, it has also said that more localized standards can be applied. *Jenkins* v. *Georgia*, 418 U. S. 153, 157 (1974). No guidance is, therefore, provided on which of the potentially different local community standards should apply. Indeed, in *Jenkins*, the Court said that jury instructions "to apply 'community standards' [are appropriate] without specifying what 'community.'" *Id.*

Moreover, in reaching its verdict, the trier of fact—in many cases a jury—can disregard expert testimony as to the prevailing community standard.

> "["Obscenity"] is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. Cf. 2 J. Wigmore, Evidence §§ 556, 559 (3d ed. 1940). No such assistance is needed by jurors in obscenity cases; indeed, the 'expert witness' practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 56 n.6 (1973).

Now we are told by the Eighth Circuit Court of Appeals that the trier of fact in a federal "obscenity" prosecution can disregard a state legislature's express declaration of the contemporary community standards in that state. According to the Court of Appeals, the following statement in *Hamling* v. *United States*, *supra*, 418 U. S. at 105, vests the jury with total discretion to determine the applicable community standard and the dimensions of that standard:

> "The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on

> knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case."

If the Court of Appeals is correct in its interpretation of this statement, a librarian, in permitting access to a library collection, will do so entirely at his peril. Thus, a librarian's consultation with experts as to the potential "obscenity" of a work affords no significant protection, because such opinions can be disregarded by the trier of fact. Most librarians do not consider themselves qualified to determine whether a given work is legally "obscene" within the definition provided in *Miller*. Librarians do not receive any professional training that would qualify them to make such a judgment. Moreover, the librarian's own views of the serious literary, artistic, political or scientific value of a given work are irrelevant. Indeed, under the Court of Appeals' interpretation, a librarian could not even rely on state law or the fact that hard core pornography is lawfully distributed within the local community.

In reality, a librarian cannot know whether distribution of a given work will result in a criminal "obscenity" prosecution until a verdict is rendered. Shockingly, the determination of "obscenity" will come for the first time—as it did in the case at bar—in the context of a criminal prosecution for engaging in a distribution wholly lawful under state law.

As long as the concept of "obscenity" is dependent upon unspecified, unascertainable and shifting local community standards, it is too indefinite and meaningless to satisfy the due process mandate that any criminal statute provide fair, advance notice of what is prohibited.

2. The Concept of "Obscenity" Is Subject to Arbitrary Enforcement and Application.

The second vice of a vague statute is that it is readily subject to arbitrary and erratic enforcement and application. That the

concept of "obscenity," in the absence of a prior in rem proceeding, is subject to abuse is amply borne out by the judgment below. See *Jenkins* v. *Georgia, supra.* Jerry Lee Smith was convicted of a distribution of materials lawful under state law. As part of his defense, he proffered examples of "hard core pornography" then currently being distributed in the community. Apparently there were no arrests or convictions for the distribution of those materials. Given the elusiveness of the concept of "obscenity," people, such as librarians, engaged in the distribution of written and other materials are at the mercy of the local prosecutor's whim as to who should be prosecuted and the judge's or the juror's subjective view of what is "obscene."

The approach to the regulation of "obscenity" adopted by the Court of Appeals is, therefore, just as susceptible to abuse as the vagrancy statute in *Papachristou* v. *City of Jacksonville,* 405 U. S. 156 (1972). There, this Court unanimously struck down the statute, stating:

> "This ordinance is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' *United States* v. *Harriss,* 347 U. S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. *Thornhill* v. *Alabama,* 310 U. S. 88; *Herndon* v. *Lowry,* 301 U. S. 242." *Id.* at 162.

In *Miller,* the Court explained that a major factor militating against abuse would be the power of appellate courts to make an independent review of the "obscenity" of the materials involved:

> "If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." 413 U. S. at 25.

However, the Court of Appeals' decision demonstrates how clearly *inadequate* that protection is. Permitting individual jurors

to determine the governing community standard concerning what is "obscene," without reference to expert testimony or even state law, effectively precludes appellate review of the jury's verdict, for the community standard applied can never be known.

3. The Necessary Effect of the Concept of "Obscenity" Is to Curtail Constitutionally Protected Rights by Compelling Self-Censorship.

In *Bantam Books,* the Court observed that the mere threat of criminal prosecution may be sufficient to prohibit the circulation of constitutionally protected publications.

> "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around . . . ." 372 U. S. at 68.

Indeed, the most constitutionally damaging consequence of a vague statute is the "chilling effect" that it has upon the exercise of protected rights. *Gooding* v. *Wilson,* 408 U. S. 518, 521 (1972); *Coates* v. *City of Cincinnati,* 402 U. S. 611, 619-20 (1971). That the unfettered right to distribute and receive "non-obscene" materials is constitutionally protected is beyond question. *Bantam Books, Inc.* v. *Sullivan, supra,* 372 U. S. at 65.

The necessary effect of permitting criminal "obscenity" prosecutions prior to any judicial determination that the materials distributed are "obscene" is to create a comprehensive censorship scheme that compels libraries, librarians and others to suppress the distribution of constitutionally protected materials.[6] A librarian can be convicted for the distribution of materials which he believes in good faith to be constitutionally protected. So long as the prosecuting officer has obtained the materials through simple removal from the library, even a minimal ex parte proceeding before a neutral magistrate is unnecessary. It is precisely this procedural framework that

6. The constitutionality of a statute must, of course, be tested by "the operation and effect of the statute in substance." *Near* v. *Minnesota,* 283 U. S. 697, 713 (1931).

chills the exercise of First Amendment rights. It places the burden of determining what is or is not "obscene" directly on librarians and other private individuals engaged in the distribution of materials to the public, with the penalty for a wrong guess being imprisonment.

Libraries and librarians have no economic incentives that justify a risk to their personal freedom to insure the widest, or, indeed, any distribution of a particular work.[7] Therefore, given the impossibility of predicting what will be declared "obscene," librarians are reasonably certain to omit all materials from their collections which, under any interpretation, could be declared "obscene." Such a course of action compels a review and "purge" of major portions of existing collections and cautious selection of future materials.[8]

7. Philosophically, however, libraries and librarians are dedicated to the public's freedom to read, and, to that end, they seek to provide access to as broad and varied a spectrum of materials, expressing as many diverse and controversial positions, as their budgets permit. The American Library Association's "Library Bill of Rights" provides in pertinent part:

"1. As a responsibility of library service, books and other library materials selected should be chosen for values of interest, information and enlightenment of all the people of the community. In no case should library materials be excluded because of the race or nationality or the social, political, or religious views of the authors.

2. Libraries should provide books and other materials presenting all points of view concerning the problems and issues of our times; no library materials should be proscribed or removed from libraries because of partisan or doctrinal disapproval.

3. Censorship should be challenged by libraries in the maintenance of their responsibility to provide public information and enlightenment.

4. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas."

8. The requirement that all works be reviewed for "obscene" content will have a significant impact on library operations and costs. The presence of "obscene" content cannot be determined without the review in the entirety of all works. Librarians do not, in most cases, review their acquisitions prior to purchase. Rather, they purchase on the basis of published reviews and requests from patrons, or through a blanket order system from publishers.

In any such "purge," librarians are certain to err on the side of caution. Hence, a library would be faced with the hard decisions of eliminating many materials from its shelves, materials such as *Catch-22*, *Manchild in the Promised Land*, *Portnoy's Complaint*, *Joy of Sex* and *Everything You Always Wanted to Know About Sex*, all of which have been recently described to librarians as "obscene." Therefore, the practice of permitting criminal prosecution without requiring a prior judicial determination of the "obscenity" of the materials being distributed necessarily inhibits the rights of libraries and librarians to distribute constitutionally protected materials. In violating the rights of librarians, the statute thereby violates the rights of library patrons to have access to constitutionally protected works. See *Smith* v. *California*, 361 U. S. 147, 154 (1959).

This Court has consistently mandated that any system of censorship provide adequate procedural safeguards.[9] Those holdings are based on the recognition that a censorship decision not to distribute constitutes a total and final prior restraint. As stated in *Freedman* v. *Maryland*, 380 U. S. 51, 57-58 (1965):

> "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." [Footnote omitted.]

In *Blount* v. *Rizzi*, 400 U. S. 410 (1971), the Court declared unconstitutional a censorship scheme, provided in the Postal Reorganization Act, that permitted the Postmaster General to

9. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 559-60 (1975); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 54-55 (1973); *United States* v. *Thirty-Seven Photographs*, 402 U. S. 363 (1971); *Blount* v. *Rizzi*, 400 U. S. 410 (1971); *Lee Art Theatre, Inc.* v. *Virginia*, 392 U. S. 636 (1968); *Freedman* v. *Maryland*, 380 U. S. 51 (1965); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43 (1961).

suspend use of the mail to individuals trafficking in allegedly "obscene" materials. The Court held that the scheme lacked the requisite procedural safeguards, which were defined as follows:

> "[T]o avoid constitutional infirmity a scheme of administrative censorship must: [1] place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor; [2] require 'prompt judicial review'—a final judicial determination on the merits within a specified, brief period—to prevent the administrative decision of the censor from achieving an effect of finality; and [3] limit to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of the final judicial determination." *Id.* at 417; see *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546, 560 (1975).

The Court has declared other censorship schemes unconstitutional because of their inherently inhibiting effect upon protected speech. In *Smith* v. *California,* the censorship scheme was effectuated by a strict liability statute that prohibited the possession of "obscene" materials. The Court stated:

> "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." 361 U. S. at 154.

The censorship scheme effectuated by 18 U. S. C. § 1461—and other criminal "obscenity" statutes that do not require a prior in rem proceeding—obviously fails to satisfy these procedural requirements. The decision of a librarian to censor the distribution of a given work is clearly not reviewable. The librarian-censor has no obligation to seek review of his decision, nor would such an obligation be fair or reasonable.[10] Likewise, the librarian has no economic incentive to provide any notice of

10. As noted in *McKinney* v. *Alabama,* 96 S. Ct. 1189, 1194 (1976), "[t]he Constitution obviously cannot force anyone to exercise the freedom of expression which it guarantees."

his decision or to seek review; indeed, there are strong economic disincentives.[11]

Neither the publisher, the author nor the individual who is deprived of access to a book will have any way of knowing that he is a victim of censorship. Each, therefore, will be precluded by ignorance from seeking review of the librarian's decision. Consequently, the private censorship decisions compelled by the statute will be final in effect, despite the fact that this is a legal decision which librarians are not qualified by training to make.

Under the Court's existing precedents, a procedure like that employed in 18 U. S. C. § 1461—whereby the "obscenity" of a work is first determined in the context of a criminal prosecution for the distribution of that work—is void for vagueness due to its failure to provide adequate notice of what is criminally prohibited, its potential for abuse and its incursions on protected rights.

B. The Evils Inherent in the Vagueness of the Concept of "Obscenity" Are Minimized by a Requirement that No Criminal "Obscenity" Prosecution Commence Until the Material Is Ruled "Obscene" in a Prior Civil Proceeding.

The Court has consistently utilized procedural tools to protect against invasions of protected speech which inevitably flow from attempts to suppress "obscenity." "Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards . . . is . . . but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books, Inc.* v. *Sullivan, supra,* 372 U. S. at 66. But "a State is not free to adopt whatever

11. Librarians are concerned that a decision not to acquire a work on the ground that it may be "obscene" could be challenged by an author or publisher in that the determination, at least to the extent made by a public library, may constitute state action in violation of First Amendment rights. Furthermore, a censorship decision, if publicly identified as such, could subject a library or librarian to a suit for trade libel for designating a work "obscene."

procedures it pleases for dealing with obscenity . . . ." *Marcus* v. *Search Warrant*, 367 U. S. 717, 731 (1961). "Rather, the First Amendment requires that procedures be incorporated that 'insure against the curtailment of constitutionally protected expression . . . .'" *Blount* v. *Rizzi*, *supra*, 400 U. S. at 416, quoting *Bantam Books, Inc.* v. *Sullivan*, *supra*, 372 U. S. at 66. As recently emphasized in *McKinney* v. *Alabama*, 96 S. Ct. 1189, 1193 (1976):

> "[T]he procedures by which a State ascertains whether certain materials are obscene must be ones which ensure 'the necessary sensitivity to freedom of expression,' *Freedman* v. *Maryland*, 380 U.S. 51, 58, 85 S.Ct. 734, 739, 13 L.Ed.2d 649, 654 (1965)."

This Court has already recognized that the most effective procedural tool for protecting First Amendment rights is a judicial determination of the "obscenity" of the materials involved in an adversary proceeding, with a right of prompt review. As stated in *Freedman* v. *Maryland*, *supra*, 380 U. S. at 58:

> "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."

Consequently, in *A Quantity of Copies of Books* v. *Kansas*, 378 U. S. 205, 210 (1964), the Court held that a seizure of all copies of a given title could not be authorized without a prior adversary hearing to "'focus searchingly on the question of obscenity.'" The Court reasoned that any other procedure would "not adequately safeguard against the suppression of nonobscene books." *Id.* at 208.

Mr. Justice Frankfurter recognized that a prior civil proceeding on the issue of "obscenity" serves to make a vague law specific and eliminates the "chilling" effect of possible criminal prosecution under unascertainable standards:

> "Instead of requiring the bookseller to dread that the offer for sale of a book may, without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity." *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 442 (1957).

This Court has repeatedly approved those state "obscenity" statutes which require a judicial determination of the "obscenity" of the work in question in a civil proceeding prior to any criminal indictments. Mr. Chief Justice Burger recently stated in *Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U. S. at 55:

> "[S]uch a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." [Footnote omitted.]

See also *Blount* v. *Rizzi*, *supra*, 400 U. S. at 420; *Freedman* v. *Maryland*, *supra*, 380 U. S. at 60; *Kingsley Books, Inc.* v. *Brown*, *supra*, 354 U. S. at 441-44.[12]

Librarians desire only to include in their collections works which they may legally distribute. Hence, self-censorship is unnecessary if they can be advised, through a noncriminal proceeding, of the works that are legally "obscene" and, therefore, prohibited to them. In order to abate the hazards to protected speech presented by the existing vague scheme of mandatory self-censorship, this Court should declare that no criminal prosecution for the distribution of allegedly "obscene" materials can be undertaken until there has been a prior judicial determination in a civil proceeding that the material is "obscene." That proceeding should take place in an adversary context, with a right

12. Although the Court recently struck down an in rem procedure statute in *McKinney* v. *Alabama*, the Court was careful to note:

> "Thus we need not condemn civil proceedings in general, see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 55, 93 S. Ct. 2628, 2633, 37 L. Ed. 2d 446, 455 (1973), to conclude that this procedure fails to meet the standards required where First Amendment interests are at stake." 96 S. Ct. at 1194.

to prompt review, and the material should be measured under the prevailing standards in the applicable local community in which the distribution would have its impact. The individuals affected should be provided reasonable notice of the determination and an opportunity to cease distributing the materials.[13]

Certainly, the Court should adopt an in rem procedure, at least for federal "obscenity" statutes like 18 U. S. C. § 1461 at issue in this case.[14] Mr. Justice Harlan emphasized that what may be permissible for the states in regulating "obscenity" is not necessarily appropriate for the federal government with its special charge for the protection of constitutional freedoms.

> "[T]he interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric. What Mr. Justice Jackson said in *Beauharnais, supra,* 343 U.S., at 294-295, about criminal libel is equally true of obscenity:

13. A judgment of "obscenity" in an in rem proceeding should be admissible in a subsequent criminal prosecution against an individual who persists in distributing the "obscene" material after receipt of notice of the prior determination. The "obscenity" of the material would still remain an essential element of the crime. Hence, if the prior determination of "obscenity" is to be binding on those persons with notice of and, therefore, an opportunity to participate in the in rem proceeding, that determination must be based on a beyond a reasonable doubt standard, *In re Winship,* 397 U. S. 358 (1970), and the right to a jury trial must be accorded, *Baldwin* v. *New York,* 399 U. S. 66 (1970); *Duncan* v. *Louisiana,* 391 U. S. 145 (1968). Persons only receiving subsequent notice of an in rem determination should have the right to relitigate the "obscenity" of the material, but the prior determination should be prima facie evidence that it is "obscene."

14. Notably, in *United States* v. *Thirty-Seven Photographs,* 402 U. S. 363 (1971), the Court interpreted 19 U. S. C. § 1305(a) regulating the importation of "obscene" material to include specified prompt judicial review procedures in accordance with the mandates of *Freedman* v. *Maryland.*

> 'The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms. Criminality of defamation is predicated upon power either to protect the private right to enjoy integrity of reputation or the public right to tranquillity. Neither of these are objects of federal cognizance except when necessary to the accomplishment of some delegated power . . . . When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquillity to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with these conflicting social interests.'

Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do." *Roth* v. *United States,* 354 U. S. 476, 504-05 (1957) (Harlan, J., concurring and dissenting) (footnote omitted).

The federal government's mandate to protect First Amendment rights is the surest basis for requiring a prior civil proceeding before commencing a federal prosecution. As this Court has recognized, such a procedure is "the best possible notice." *Paris Adult Theatre I* v. *Slaton, supra,* 413 U. S. at 55.

C. Requiring a Prior In Rem Proceeding Is Consistent with the Right of the Local Community to Limit the Distribution of Commercialized "Obscenity."

Amici recognize this Court's concern for permitting local communities, if they desire, to "[stem] the tide of commercialized obscenity." *Paris Adult Theatre I* v. *Slaton, supra,* 413 U. S. at 57. But that goal is equally well served under a prior in rem procedure without the concomitant and impermissible infringement of First Amendment rights.

The local community can be as active in commencing civil proceedings as its "local community standards" dictate. The civil proceeding, involving, where necessary, injunctive relief, has been used effectively and is gaining increasing favor.[15] Such an approach properly focuses responsibility for enforcement of a community's own standards on those with the responsibility to do so.

To the extent deemed necessary to protect against short term distributions that might not permit authorities to move promptly in court, predistribution screening is certainly permissible so long as the procedural requirements of *Freedman* v. *Maryland* and *Blount* v. *Rizzi* are met. Furthermore, nothing prevents a local community from experimenting with reasonable "time, place, and manner" regulations deemed necessary. See, *e.g.*, *Young* v. *American Mini Theatres, Inc.*, 96 S. Ct. 2440 (1976);

15. That such civil proceedings are "gaining increasing favor among the States" was pointed out by Mr. Justice Brennan in his concurrence in *McKinney* v. *Alabama, supra,* 96 S. Ct. at 11.95. Several states require a mandatory prior civil or in rem proceeding to determine "obscenity" before a criminal prosecution can be instituted *e.g.*, Ark. Stat. Ann. §§ 41-3563 to -3576 (1976) (applicable only to "mailable matter"); La. Rev. Stat. Ann. § 14:106(F)(1) (1974) (not required for "close-up depiction of human genital organs so as to give the appearance of the consummation of ultimate sexual acts"); Mass. Ann. Laws ch. 272, § 28C (Cum. Supp. 1975) (applicable only to "books"); N. C. Gen. Stat. § 14-190.2 (Cum. Supp. 1975); N. D. Cent. Code §§ 12.1-27.1-05 to -08 (1976); Vt. Stat. Ann. tit. 13, §§ 2809—10 (Cum. Supp. 1975) (mandatory only for "written matter in a book or other publication"); Wis. Stat. Ann. § 944.25 (Cum. Supp. 1975) (applicable only to material disseminated to minors). Others have nonmandatory civil or in rem procedures to determine "obscenity" without a criminal proceeding *e.g.* Ala. Code tit. 14, ch. 64A (Cum. Supp. 1973) (applicable only to "mailable matter"; declared unconstitutional in *McKinney* v. *Alabama, supra;* Iowa Code Ann. § 725.4 (Supp. 1976); Neb. Rev. Stat. § 28-926.20 (Cum. Supp. 1974); Nev. Rev. Stat. § 201.250(4) (1973); Ohio Rev. Code Ann. §§ 2903.36—.37 (Page 1975); Okla. Stat. Ann. tit. 21, §§ 1040.14 § —.20) (Cum. Supp. 1975-1976) (applicable only to "mailable matter"); R. I. Gen. Laws Ann. §§ 11-31.1-12 (1970); Va. Code Ann. § 18.2-384 (1975) (available only for "books"); Wash. Rev. Code § 9.68.060 (Supp. 1974) (applicable only to "erotic materials" for minors). See also Commission on Obscenity and Pornography, *Report* 53 (1970).

cf. *Cox* v. *Louisiana,* 379 U. S. 536, 554-55 (1965). Similarly, a local community can prohibit pandering, cf. *Ginzburg* v. *United States,* 383 U. S. 463 (1966),[16] or proceed under its seizure powers, cf. *A Quantity of Copies of Books* v. *Kansas, supra.* These mechanisms provide a local community with ample tools for curbing the "crass commercial exploitation of sex." *Paris Adult Theatre I* v. *Slaton, supra,* 413 U. S. at 63.

16. In prohibiting pandering, conduct would be regulated, not constitutionally protected speech.

CONCLUSION.

We submit that a prior in rem procedure provides a practical solution to "the intractable obscenity problem." Such an approach is the "sensitive tool" by which this Court can separate "legitimate from illegitimate speech," *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958), avoid the hazards of self-censorship and "compensate for the ambiguities" in the concept of "obscenity," *Mishkin* v. *New York*, 383 U. S. 502, 511 (1966).

As a consequence, librarians, authors, publishers and booksellers will not be compelled to engage in self-censorship. They will know the works prohibited to them. This in turn will eliminate, or at least minimize, the risk that the inherent elusiveness of the concept of "obscenity" will cause a person, like the petitioner Jerry Lee Smith, to "be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss, supra*, 347 U. S. at 617.

At the same time, the objectives of "obscenity" laws would be achieved. "Obscene" works could still be identified, their distribution could still be enjoined or controlled and persons persisting in distributing such works could still be vigorously prosecuted.

Accordingly, this Court should reverse the decision of the Court of Appeals for the Eighth Circuit and, in so doing, establish that no criminal prosecution for the distribution of allegedly "obscene" material can be undertaken prior to notice of a judicial

determination in an in rem proceeding that the material is "obscene."

Respectfully submitted,

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Dated September 8, 1976.

amicus brief

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976
NO. 75-1439

JERRY LEE SMITH
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Brief Amicus Curiae of Citizens for Decency Through Law, inc., in Support of the Respondent, United States of America.

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UNITED STATES CONSTITUTION

TEXTBOOKS

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OPINIONS BELOW

The unreported order of the Federal District Court for the Southern District of Iowa denying a motion for a new trial is reproduced at Exhibit "A" to the Brief herein. The unreported per curiam opinion of the United States Court of Appeals for the Eighth Circuit is reproduced at Exhibit "B" to the Brief herein.

JURISDICTION

The jurisdiction of the Iowa District Court was based on 18 U.S.C. § 3231. The jurisdiction of the Court of Appeals was founded upon 28 U.S.C. § 1291.

The judgment of the Court of Appeals was entered on February 13, 1976. A Petition for a Writ of Certiorari was filed on April 10, 1976, and granted on June 21, 1976. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the refusal of a federal court and jury to adopt the "contemporary community standards" consciously established by the Iowa Legislature, as the test for measuring "obscenity" in a prosecution under 18 U.S.C. § 1461 for a wholly intra-Iowa mailing of allegedly "obscene" materials ignore this Court's prior decisions and defy fundamental principles of our federalist system?

2. Did the Court of Appeals, in ruling that jurors can disregard the conscious determination of their state legislature to deregulate the distribution of sexually related matter to consenting adults in Iowa, render 18 U.S.C.

§ 1461 unconstitutionally vague as applied?

3. Did the District Court's refusal at voir dire to probe the prospective jurors' knowledge of the "contemporary community standards" in Iowa deny petitioner due process of law?

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS INVOLVED

CHAPTER 725

OBSCENITY AND INDECENCY

725.1 DEFINITIONS. As used in this section and sections 725.2 to 725.10, unless the context otherwise requires:

1. "Obscene material" is any material depicting or describing the genitals, sex acts, masturbation, excretory functions or sado-masochistic abuse which the average person, taking the material as a whole and applying contemporary community standards with respect to what is suitable material for minors, would find appeals to the prurient interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political or artistic value.

2. "Material" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion

picture or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

3. "Disseminate" means to transfer possession, with or without consideration.

4. "Knowingly" means being aware of the character of the matter.

5. "Sado-masochistic abuse" means the infliction of physical or mental pain upon a person or the condition of a person being fettered, bound or otherwise physically restrained.

6. "Minor" means any person under the age of eighteen.

7. "Sex act" means any sexual contact, actual or simulated, between two or more persons, either natural or deviate, or between a person and an animal, by penetration of the penis into the vagina or anus, or by contact between the mouth and genitalia or anus, or by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

725.2. DISSEMINATION AND EXHIBITION OF OBSCENE MATERIAL TO MINORS. Any person, other than the parent or guardian of the minor, who knowingly disseminates or exhibits obscene material to a minor, including the exhibition of obscene material so that it can be observed by a minor on or off the premises where it is displayed, is guilty of a public offense and shall upon conviction be imprisoned in the state penitentiary for not to exceed one year or be fined not to exceed one thousand dollars or be subject to both such fine and imprisonment.

725.3. ADMITTING MINORS TO PREMISES WHERE OBSCENE MATERIAL IS EXHIBITED. Any person who knowingly sells, gives, delivers or provides a minor with a pass or admits a minor to premises

where obscene material is exhibited is guilty of a public offense and shall upon conviction be imprisoned in the state penitentiary for not to exceed one year or be fined not to exceed one thousand dollars or be subject to both such fine and imprisonment.

725.4. CIVIL SUIT TO DETERMINE OBSCENITY. Whenever the county attorney of any country has reasonable cause to believe that any person is engaged or plans to engage in the dissemination or exhibition of obscene material within his county to minors he may institute a civil proceeding in the district court of the county to enjoin the dissemination or exhibition of obscene material to minors. Such application for injunction is optional and not mandatory and shall not be construed as a prerequisite to criminal prosecution for a violation of sections 725.1 to 725.10.

725.5. EXEMPTIONS FOR PUBLIC LIBRARIES AND EDUCATIONAL INSTITUTIONS. Nothing in sections 725.1 to 725.10 prohibits the use of appropriate material for educational purposes in any accredited school, or any public library, or in any educational program in which the minor is participating. Nothing in said sections prohibits the attendance of minors at an exhibition or display of art works or the use of any materials in any public library.

725.6. SUSPENSION OF LICENSES OR PERMITS. Any person who knowingly permits a violation of section 725.2 or 725.3 to occur on premises under his control shall have all permits and licenses issued to him under state or local law as a prerequisite for doing business on such premises revoked for a period of six months. The county attorney shall notify all agencies responsible for issuing licenses and permits

of any conviction under section 725.2 or 725.3.

725.7. EVIDENCE CONSIDERED. At a trial for violation of sections 725.2 and 725.3 the court may consider the material, and receive into evidence in addition to other competent evidence, the offered testimony of experts pertaining to:

1. The artistic, literary, political or scientific value, if any, of the challenged material.
2. The degree of public acceptance within the community of the material or material of similar character.
3. The intent of the author, artist, producer, publisher or manufacturer in creating the material.
4. The advertising promotion and other circumstances relating to the sale of the material.

725.8. AFFIRMATIVE DEFENSE. In any prosecution for disseminating or exhibiting obscene material to minors, it is an affirmative defense that the defendant had reasonable cause to believe that the minor involved was eighteen years old or more and the minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was eighteen years old or more or was accompanied by a parent or spouse eighteen years of age or more.

725.9. UNIFORM APPLICATION. In order to provide for the uniform application of the provisions of sections 725.1 to 725.10 relating to obscene material applicable to minors within this state, it is intended that the sole and only regulation of obscene material shall be under the provisions of these sections, and no municipality, county or other governmental unit within

this state shall make any law, ordinance or regulation relating to the availability of obscene materials. All such laws, ordinances or regulations, whether enacted before or after said sections, shall be or become void, unenforceable and of no effect upon July 1, 1974.

TITLE 18, CHAPTER 71, SECTION 1461 OF THE UNITED STATES CODE, PROVIDES IN PERTINENT PART:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and --

* * * * *

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made,...

* * * * *

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of Title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulation or disposing thereof, or aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more

than ten years, or both, for each such offense thereafter."

STATEMENT OF THE CASE [1]

By virtue of an indictment filed March 26, 1975, petitioner Jerry Lee Smith was charged with seven counts of placing non-mailable matter in the United States Mails in violation of Title 18, United States Code, Section 1461 and 2. (Appendix pp.3-7)

Trial commenced on September 8, 1975, and the jury reached a verdict of guilty on all seven counts on September 9, 1975. (Appendix p.13).

On October 14, 1975, petitioner was sentenced to a term of three years imprisonment on each count with all but six months of this term suspended. Petitioner was also sentenced to three years probation on each count. The sentences on each count were to run concurrently. On the same day, petitioner filed his appeal. (Appendix pp.35-36).

Prior to the selection of the jury on September 8, 1975, petitioner filed the following list of proposed voir dire questions for prospective jurors. (Appendix p.8).

1/ See agreed "Statement of the Case" at pages 38-41 of the Appendix.

1. Are any members of the panel a member of or are in sympathy with any organization which has for its purpose the regulating or banning of alleged obscene materials?

2. Will those jurors raise their hands who have any knowledge of the contemporary community standards existing in this federal judicial district relative to the depiction of sex and nudity in magazines and books?

(The following individual questions are requested for each juror who answers the above question in the affirmative.)

3. Where did you acquire such information?

4. State what your understanding of those contemporary community standards are?

5. In arriving at this understanding, did you take into consideration the laws of the State of Iowa which regulate obscenity?

6. State what your understanding of those laws are.

The court accepted in substance Requested Instruction No. 1 but denied all other requests. In addition, the trial court denied petitioner

the right to make oral inquiries of a similar nature to the jury. (Appendix p.38).

Evidence offered by the Government established the following facts:

1. At Des Moines, in the Southern District of Iowa, on or about February 1, 1974, petitioner knowingly did cause to be mailed to John Leffler, Box 291, Guthrie Center, Iowa 50115, Trial Exhibits 4 and 4A.

2. At Des Moines, in the Southern District of Iowa, on or about June 25, 1974, petitioner knowingly did cause to be mailed to Jay Weber, Box 541, Mount Ayr, Iowa 50854, Trial Exhibits 10, 10A, 10B, 10C, 10D, 10E, 10F, 10G, 10I, 10J, 10K, 10L, 10M, 10N, 10O, 10P, 10Q, and 10R.

3. At Des Moines, in the Southern District of Iowa, on or about June 27, 1974, petitioner knowingly did cause to be mailed to John Leffler, Box 291, Guthrie Center, Iowa 50115, Trial Exhibits 6, 6A, 6B, 6C, 6D, 6E, 6F, 6H, 6I, 6J, 6K, 6L, 6M, 6N, 6O, and 6P.

4. At Des Moines, in the Southern District of Iowa, on or about July 10, 1974, petitioner knowingly did cause to be mailed to Jay Weber, Box 541, Mount Ayr,

Iowa 50854, Trial Exhibits 12, 12A, 12B, 12C, 12D, 12E, 12F, 12G, 12H, 12I, 12J.

5. At Des Moines, in the Southern District of Iowa, on or about July 30, 1974, petitioner knowingly did cause to be mailed to Jay Weber, Box 541, Mount Ayr, Iowa 50854, Trial Exhibits 14, 14A, 14B, and 14C.

6. At Des Moines, in the Southern District of Iowa, on or about July 30, 1974, petitioner knowingly did cause to be mailed to John Leffler, Box 291, Guthrie Center, Iowa 50115, Trial Exhibits 7 and 7A.

7. At Des Moines, in the Southern District of Iowa, on or about October 2, 1974, petitioner knowingly did cause to be mailed to John Leffler, Box 291, Guthrie Center, Iowa 50115, Trial Exhibits 8 and 8A.

Further evidence offered by the Government established that the names and addresses of the above described addresses are fictitious. All mail sent to these names and addresses was delivered through the postal system to the Postmaster serving each address.

It was stipulated by the parties that the communities of Des Moines, Iowa, Guthrie

Center, Iowa, and Mount Ayr, Iowa, are all located within the Southern Judicial District of Iowa in the Federal judicial system.

Evidence offered by the petitioner established the following facts:

1. Trial Exhibits A-1 (porno magazine), A-2 (porno magazine), and A-3 (porno magazine) were available for purchase by adults at the Davenport Swingers World, Inc. Book Store in Davenport, Iowa on August 8, 1975.

2. Trial Exhibits B-1 (film), B-2 (film), B-3 (porno magazine), and B-4 (porno magazine) were available for purchase by adults at the Adult Dream Book Store in Des Moines, Iowa on August 12, 1975.

3. Trial Exhibits C-1 (film), and C-2 (publication) were available for purchase by adults at the Bachelors Library in Des Moines, Iowa on August 12, 1975.

4. Trial Exhibits D-1 (publication) were available for purchase by adults at the Adult Center Book Store in Des Moines, Iowa on August 12, 1975.

5. Trial Exhibits E-1 (publication) was available for purchase by adults at the Red Eye Book Store in Des Moines, Iowa

on August 12, 1975.

6. Trial Exhibits F-1 (publication), and F-2 (publication) were available for purchase by adults at the Discount Adult Book Store in Davenport, Iowa on August 14, 1975.

7. Pursuant to stipulation of the parties as to foundation Trial Exhibit G, a copy of Chapter 725 of the Iowa Code, was introduced into evidence.

8. Pursuant to stipulation of the parties as to foundation Trial Exhibits H, I, J, K, L and M (advertisements appearing in the Des Moines Register and Tribune for May 22, June 4, August 15, 16 and 22, 1975) were introduced into evidence.

At the conclusion of the Government's case, petitioner made a motion for judgment of acquittal which was denied. (Appendix p.41). Petitioner's motion at the close of all the evidence was also denied. (Appendix p.41).

The District Court instructed the jurors, in determining whether the materials distributed were "obscene," "to draw on your own knowledge of the views of the average person in the community," but left them free to disregard Chapter 725 of the Iowa Code and the lawful availability of comparable materials in their community.

(Appendix p.23).[2/]

2/ This Iowa problem has its roots in this Court's 1973 obscenity rulings wherein "specificity" was made a constitutional requirement. In Iowa v. Wedelstedt, 213 N.W.2d 652 (Dec. 19, 1973), the Iowa Supreme Court refused to follow this Court's lead regarding "judicial gloss" and struck the Iowa criminal statute as vague. Further, when a County Attorney attempted to utilize the Iowa civil public nuisance statute to halt the exhibition of "Deep Throat" in Marion, Iowa, the Iowa Supreme Court struck that defense for the same reason. See Iowa ex rel. Faches v. N.D.D., Inc. d.b.a. Marion Adult Theater, 228 N.W.2d 191, 192 (Apr. 16, 1973) where the Iowa Supreme Court said:

> "In State v. Wedelstedt, 213 N.W.2d 652 (Iowa 1973), we held unconstitutional a former criminal obscenity statute for vagueness and overbreadth. In State v. Kueny, 215 N.W.2d 215 (Iowa 1974), we held a criminal lewdness statute unconstitutionally vague. In the present case the State seeks to enjoin the movies under the sole claim the premises are used for the purpose of 'lewdness'. The term 'lewdness' is as vague when used in section 99.1 as it was in the sections we considered in Wedelstedt and Kueny. Section 99.1 cannot provide a basis for enjoining undefined 'lewdness'.
>
> "The State's argument fails because it looks only to what the statute can provide rather than considering what our statute actually provides. Miller and Paris Adult Theatre I hold only what our statutes could regulate. Under the foregoing authorities they failed to do so."

For a more correct view, historically and ethically, compare: People ex rel. Busch et al. v. Projection Room Theater et al., 16 Cal.3d

After the guilty verdict was returned, petitioner moved for a new trial (Appendix pp.29-30), which was denied by Order dated October 14, 1975. (Appendix pp. 32-34. See copy appearing at Exhibit "A" to this Brief Amicus Curiae).

Petitioner then appealed the District Court's rulings to the Eighth Circuit Court of Appeals. (Appendix p.37). In his appeal, petitioner raised the following legal issues:[3/]

(1) The Court erred in refusing defendant's

360, 546 P.2d 733, 128 Cal.Rptr. 229, vacated and new opinions substituted in 17 Cal.3d 42, 550 P.2d 600, 130 Cal.Rptr. 328 (June 1, 1976), petition for certiorari filed on Aug. 30, 1976 in this Court in Van de Kamp v. Projection Room Theater, No. 76-390 October Term 1976.

Although three bills were introduced during the 1974 legislative session (S.F.1057, S.F.1066 and H.F.1102), only House File 1102 succeeded in getting out of committee, being enacted as Chapter 725 of the Iowa Code. Further attempts to enact obscenity legislation during the 1975 session (S.F.219, H.F.513 and H.F.889) were similarly unsuccessful, with the bills being kept bottled up in committee. During the 1976 session, a conference committee succeeded in striking from the proposed revision of the Iowa Criminal Laws the controls which were to be imposed upon the sale of pornographic material to adults (See Des Moines Register news article of May 21, 1976, appearing at Exhibit "C" to this brief).

3/ See the agreed "Statement of Points Raised By Appellant in This Appeal" appearing in the Appendix at page 42.

requested questions for prospective jurors and refusing to allow defendant to make similar inquiries.

(2) The Court erred in not granting defendant's motions for judgment of acquittal made at the conclusion of the government's evidence and at the close of all evidence.

(3) The Court erred in not granting defendant's motion for a new trial.

The Court of Appeals affirmed per curiam. (Appendix pp. 44-46.)

SUMMARY OF ARGUMENT

I

Under Rule 24(a) of the Federal Rules of Criminal Procedure, the district court has a wide discretion as to what questions are proper on voir dire, which will not be disturbed, without a clear showing of abuse of discretion.

The individual juror's knowledge of the contemporary community standards relative to the depiction of sex and nudity in magazines and books is not a proper subject for voir dire examination. That inquiry is foreclosed, for such knowledge is presumed from the fact that such person has been chosen as a juror. The law presumes that a juror, if otherwise qualified to sit, has the requisite experience, drawn from

life and common speech, to aid in determining the acceptable mesne which most nearly satisfies the moral demands of a community. Judge Hand called the "verdict on obscenity" a "small bit of legislation ad hoc, like the standard of care which the Constitution imposes on a jury as a duty." The Court of Appeals was correct in its analogy to the "reasonable man" rule.

The voir dire examination ought not to be permitted to take an indefinite wide range covering collateral estoppel or incidental matters having some connection with the case. Questions relating to the individual juror's knowledge of the contemporary community standards are not proper because they do not bear on the juror's qualification to serve, or place his bias in question, but pertain rather to questions of law (presumed knowledge, if qualified to sit) and the ultimate question of guilt or innocence.

The trial judge's ruling was correct for yet another reason. Questions are improper which are calculated to give undo importance to any feature of the case. The questions were improper as an attempt to place before the jury the historical facts and legal issue which was a matter of law for the court to decide.

(i.e., the effect on the federal postal statute of the inability of the state legislature, after the Iowa Supreme Court's invalidating the Iowa obscenity statute, to enact state legislation which would criminalize the distribution of obscene materials to adults within the state of Iowa.)

Petitioner's reliance on Aldrich v. U.S. and Ham v. South Carolina is misplaced. The same arguments were advanced and rejected by this Court in Hamling v. U.S.

II

The application of 18 U.S.C. section 1461 to the use of the mails for the intrastate shipment of obscene materials is a proper exercise of federal power. Unlike the commerce power over obscene materials, which extends only to interstate transportation, the federal controls over postal matters encompass intrastate mailings as well. One of the landmark cases in this area, Ex Parte Jackson, 96 U.S. 727 (1877), involved intrastate facts similar to those presented in the cause herein, except that there the subject matter involved a lottery, and the deposit of a lottery ticket in the New York mails for delivery to a New York address.

Although Chapter 725 of the Iowa Code failed to impose criminal sanctions at the state level

against conduct involving the dissemination of matter to adults which would be obscene under Federal standards, the entire expression of the legislature is not clear. Amicus submits that such legislation did not, and could not, prevent the government from criminalizing such conduct at the local level and/or taking action to abate the same civilly as a public nuisance, nor did the Iowa legislation render such subject matter acceptable to the contemporary community standards.

The pre-emption provision of Chapter 725 of the Iowa Code is ambiguous. By its very language, the Statute purports to legislate as to material which is obscene to minors.

Section 725.9 entitled "Uniform Application", is clearly a pre-emptive provision, but, in view of the definitions section, there is a serious question as to whether such pre-emption was meant to extend to anything beyond that class of materials which is "obscene to minors". See State of Washington v. J.R. Distributing, Inc. 82 Wash. 2d 584, 512 P.2d 1049.

Chapter 725 of the Iowa Code should be interpreted as not effecting an implied pre-emption, so as to avoid a Constitutional confrontation with the Federal Postal statute.

The pre-emption which Petitioner urges

would be unlawful, as depriving the citizens of the local communities in Iowa of a federally protected right to live in a community whose public morals, moral values and environment are free from the degrading and corrupting influences of patently hard-core pornography.

The judiciary has a moral responsibility as the guardian of the people's morals. To recognize a "pre-emption" under the circumstances would deprive the citizens of the State of Iowa of:

(1) due process of law and equal protection of the law;

(2) the police power and "home rule" authority which is inherent in municipal authority; and

(3) one of the fundamental rights essential to the concept of well-ordered liberty; namely, the right to enjoy "common decency" and to live in a community whose public morals, moral values and environment are free from the illegal, degrading and corrupting influences of such patently hard-core pornography.

Where government vice is involved, local government's power to abate the same is inherent, and plenary, and may not be interfered with,

not even at the level of the State Legislature. This Court has many times recognized that a legislative body may not bargain away its power to protect public morals nor excuse its failure to perform a public duty by saying it had been agreed, by legislative inaction, not to do so.

Remote language in Paris Adult Theater v. Slaton, Memoirs v. Massachusetts, and U.S. v. Reidel, cannot be read in a manner which would place those cases at odds with the above-stated legal principle. Whereas it is true that a state legislature may choose by inaction not to legislate in the criminal area, it may not, by that inaction, foreclose the right of a local government, such as a city, from applying rudimentary law to that subject matter which the universal judgment of mankind says "should be restrained." U.S. v. Roth.

The power of local government to protect the public morals of the local community against public conduct which is regarded as malum in se may not be interfered with.

The experience of all mankind condemns any occupation that tampers with the public morals and the promotion of evil manners, and anything that produces that result finds no encouragement from the law, but is universally

regarded and condemned by it as a public nuisance.

There can be no question but that where a public nuisance exists within its corporate limits that is a "per se" nuisance at common law, a local government may abate the same under the common law. The common law in such a case comes in aid of the authorities, and they are justified in the act, not because they are officials of the city, but because they are citizens injured by the thing abated.

Even assuming that Chapter 725 of the Iowa Code was intended to effect a pre-emption which would guarantee the unrestricted distribution to adults in Iowa of hard-core pornography which under federal law would be obscene, such legislation would be invalid because in direct conflict with federal law.

Such legislative action would be in conflict with Art. I, section 10, of the Federal Constitution. The 1911 treaty entitled "Agreement for the Suppression of the Circulation of Obscene Publications" is a part of the law of every state. The State of Iowa may not legislate to encourage the dissemination of subject matter which the United States of America by treaty is required to discourage. Where a conflict exists between the provisions of a treaty and

the provisions of a state statute, the treaty invalidates such legislation.

Such legislative action would also be invalid under the "one people" concept regarding the federal police power. The "one people" concept of federalism, envisions the federal government as having been granted plenary power to control the mail and interstate commerce and being charged with the concommitant responsibility of adminstering those controls, which have been established at the national level by the State's representatives, in a way which will safeguard and maintain the standards of public decency (morality) which are common to the individual State members of the compact.

Under the "one people" concept, the federal government has total control over that subject matter which can be identified as hard-core pornography. Hard-core pornography is defined as that subject matter as to which reasonable minds would not differ and all would hold to be pornographic.

Contrary to petitioner's arguments, obscenity is not "predominantly a matter of state interest," but is, under the "one people" concept, a matter of state and federal interest. The independant federal interest has been identified by this Court in the well documented views of Justice

Harlan. The foundation for Harlan's views on hard-core pornography are to be found in the "one people" concept. In granting such power to the federal government over postal matters which were obscene, it was the expectation of the compact States that the federal government would administer such powers to suppress that subject matter which was considered to be injurious to the public morals which were common to all of the states.

In Congress, the several states have assembled and established a comprehensive set of federal controls of obscenity over: (1) importation from abroad, (2) use of the mails, (3) transportation in interstate commerce, and (4) international movement. In view of the comprehensive nature of such federal legislation, it is difficult to understand petitioner's claim that the Iowa legislature has "conclusively determined contemporary community standards" as against the federal claim that such matters may not be placed in the mails. Long ago this Court said in Champion v. Ames:

> "But surely it will not be said to be a part of anyone's liberty as recognized by the Supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be

confessedly injurious to the public morals."

and

> "We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end."

Such legislative action would also be invalid under the Supremacy Clause. When Congress exercises a granted power, the federal legislation may displace state law under the Supremacy Clause. Gibbons v. Ogden; Rice v. Santa Fe Elevator Corporation. On the question of whether hard-core pornography is to be tolerated, federal law has occupied the field.

The disposition of "hard-core pornography" inherently is a matter for federal control. In Congress assembled, representatives of the several states have established comprehensive federal controls on obscenity. Where the evidence clearly points to a total restraint on such subject matter (hard-core pornography) the Federal compact must prevail, and pre-emption is clearly operative.

The congressional intent has been clearly stated that obscenity shall not be given a free reign. Petitioner's contention that

Iowa state law, liberating obscenity, should be adopted because of the "silence of congress" is completely unsupported by the factual evidence. Public Law 90-100 made a specific finding that obscenity and pornography is a matter of national concern. See also Senate Resolution No. 477 which rejected the findings of the Commission which recommended the liberation of obscenity. Petitioner's argument also runs contrary to this Court's recent clarification in Hamling v. U.S. wherein it delineated what Congress has proscribed by 18 U.S.C. section 1461.

Contrary to Petitioner's arguments, this Court has not indicated, with regard to competing interests, that it recognized that regulation of obscenity is predominantly a matter of state, not federal interest, nor has the Court indicated that it has rejected any need for national uniformity. Solutions offered by the Court in those cases were arrived at in response to the problem of how to find an accommodation between the opposing interests of the First and Tenth Amendments,. That accommodation does not in any way dispute or deny the national need to provide controls which aid in the individual state efforts to suppress the worst of such materials — hard-core pornography — that which

lies at the bottom of the barrel.

If, as Petitioner argues "the test does not vary between Federal and State prosecutions" and "the same contemporary community standards should be applied in Federal as well as State prosecutions", then it must necessarily follow that one or the other must control since one legislative standard (Federal) criminalizes traffic in such matter, whereas the other (State) does not.

The principle which petitioner urges that an individual should receive uniform treatment in the state of his residence and that the same act should not be governed by two different standards must be examined in its proper context. While engaging in "Russian Roulette," Petitioner wants an assurance that he will not be killed. The law does not give him that assurance. So long as he operates in the mud, he is not entitled to the same consideration as those who reach for the stars.

In sum, the bent of the Federal law is to proscribe hard-core pornography. Petitioner's argument that to affirm the conviction will nullify state law without (1) a clear state of congressional intent, or (2) an inherently federal subject matter, is without merit. The answer to those contentions is found in Public

Law 90-100, the enactment of a comprehensive pattern of federal obscenity statutes, and the "one people" concept relating to the nature of the federal police power.

ARGUMENT

I

THE SIXTH AMENDMENT RIGHT TO TRIAL "BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED," AND THE FIFTH AMENDMENT GUARANTEE OF "DUE PROCESS OF LAW" DO NOT REQUIRE "VOIR DIRE" EXAMINATION OF JURORS ON THE QUESTION OF WHETHER THEY HAVE KNOWLEDGE OF THE CONTEMPORARY COMMUNITY STANDARDS.

A. The District Court Has A Wide Discretion As To What Questions Are Proper On Voir Dire, Which Will Not Be Disturbed, Absent A Clear Showing Of Abuse of Discretion.

Rule 24(a) permits a district court to conduct the voir dire examination, making use of questions submitted by the parties "as it deems proper."[4/]

4/ Rule 24(a) provides:
Rule 24. Trial jurors -- (a) Examination. -- The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

Considerable discretion is lodged in the trial court as to what questions are deemed to be proper on voir dire, U.S. v. Cook, 270 F.2d 725, affirming 165 Fed.Sup. 212, and the prevailing rule is that a court's determination as to what questions should be put to the jury will not be disturbed without a clear showing of abuse of discretion. United States v. Blount, 479 F.2d 650 (1973, CA.6 Ohio).

B. The Individual Juror's Knowledge Of The Contemporary Community Standards Relative To The Depiction Of Sex And Nudity In Magazines And Books Is Not A Proper Subject For Voir Dire Examination.

Petitioner's justification for his question is stated in the Brief for Petitioner at page 4:

> "Petitioner sought only to determine whether the prospective jurors had any such knowledge."

That inquiry, however, is foreclosed, for such knowledge is presumed from the fact such person has been chosen as a juror. "'Obscenity' is a function of many variables, and the verdict of the jury is not the conclusions of a syllogism of which they (jurors) are to find only the

minor premise but really a small bit of legislation ad hoc, like the standard of care." See Judge Learned Hand speaking in U.S. v. Levine, infra. The law presumes that a juror, if otherwise qualified to sit, has the requisite experience, drawn up instinctively from life and common speech, to aid in determining the acceptable mesne which most nearly satisfies the moral demands of a community. In U.S. v. Kennerley, 209 F.119 (SDNY 1913), Justice Learned Hand, often called the "architect" of modern obscenity law, had the following to say in this regard, at page 121:

> ". . . If there be no abstract definition such as I have suggested, should not the word 'obscene' be allowed to indicate the present, critical point in compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence. . . .
>
> "Nor is it an objection, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm

the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. A jury is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech." (Emphasis provided.)

In a later case, U.S. v. Levine, 83 F.2d 156, 157 (1936), cited in Roth-Alberts, 354 U.S. 476 at footnote 26, as consistent with the obscenity law expressed therein, Judge Hand called the verdict on "obscenity" a "small bit of legislation ad hoc, like the standard of care which the Constitution imposes on a jury as a 'duty'" at page 157:

> "As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. We impose such a duty upon a jury (Rosen v. United States, supra, 161 U.S. 29, 42, 16 S.Ct. 434, 480, 40 L.Ed. 606), because the standard

> they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of a community. . . . Thus, 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusions of a syllogism of which they are to find only the minor premise but really a small bit of legislation ad hoc, like the standard of care." (Emphasis provided.)

While the petitioner's argument (Brief for Petitioner at page 41) takes issue with the opinion of the Court of Appeals below and that Court's analogy to the "reasonable man" rule (See Point 1 C, infra, at page 26), and would disagree with the above-stated analysis of Judge Learned Hand, the distinctions which are stated in petitioner's brief are without substance.

Petitioner's objection (Brief for Petitioner at page 3) that "the District Court allowed the jurors to legislate their own views of the community standards governing what is "obscene" in Iowa is not well taken. In the sense noted by Judge Hand above, that is exactly what the law requires them to do.

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C. U. S. District Judge W. C. Stuart's Ruling Was Correct. There Was No Abuse of Discretion.

The voir dire examination ought not to be permitted to take an indefinitely wide range covering collateral or incidental matters having some connection with the case. 50 C. J. S. Juries § 275 at page 1041. For example, had this been a civil negligence lawsuit, it would not have been proper for the petitioner to ask the individual jurors specific questions regarding their knowledge of the standard of care for the negligent act which was at issue. See Point I(B), supra, at page 20. Amicus submits that the reasoning in U. S. District Judge W. C. Stuart's order denying the motion for a new trial (See Exhibit "A" to this brief at page A-2) was entirely correct when he stated:

> "A juror's role in cases of this character is revealed in the following passage from Hamling v. United States (1974), 418 U.S. 87, 105:
>
> > The result of the Miller cases, therefor, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in

> > obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person applying contemporary community standards' would reach in a given case.

A contemporary community standard, by its very nature, is a varying concept. Clearly, it is the intended province of the jury to determine that standard and apply it to the facts of a given situation. Instructions were given at the close of the evidence in this case as to what constitutes a contemporary community standard and how such a standard is to be discerned. This, the Court believes, is all the law demands under the circumstances. To require the disclosure of a prospective juror's knowledge in this respect is no more required than would pretrial disclosure of a juror's concept of 'reasonableness' be necessary where that standard is an essential element."

Such questions do not bear upon the juror's qualifications to serve, or place his bias in question. cf. U.S. v. Robinson, 154 App. D.C. 265, 475 F.2d 376. As explained by Court of Appeals Justice Tom C. Clark, in affirming the

trial court's ruling. (See Exhibit "B" to Amicus Curiae Brief at page B-2):

> "The juror reaches his verdict by applying the definition of obscenity given him by the judge to the facts introduced into evidence, on a contemporary community standard. He draws on his own knowledge as to the views of the average person in the community, just as he does when he determines the propensities of the 'reasonable' or 'average' person in other areas of decision making. Jurors do not have such standards on their tongues; nor do they wear them on their sleeves; they are inborn and often undefinable.
>
> This is not to say that no questions can be asked the jury panel in this area, but only that the specific ones tendered here were impermissible. They smacked of the law, of casuistry, of the ultimate question of guilt or innocence, rather than the qualifications to serve as a juror, bias, etc."

The ruling of the trial judge was correct for yet another reason. Questions are improper which are calculated to give undue importance to any feature of the case. C.J.S. Juries § 275 at page 1042. It seems clear that the

questions which were posed by petitioner's trial council were designed to place before the jury the historical event and facts which supplied the foundation for the legal issue which was before the trial court; namely, the effect on the federal postal statute (criminal) of the failure of the state legislature to enact legislation,[5/] subsequent to this Court's decisions in Miller v. California et al., supra, which would criminalize conduct involving the distribution, etc., of obscene matter to adults within the State of Iowa. For the reasons stated hereinafter at Point II, the failure of the State Legislature to criminalize such conduct could have no effect on a trial in the federal district court involving the Federal Postal Crime, and therefore the question as posed by Petitioner's Council was improper.

D. Petitioner's Reliance On Aldridge v. U.S. And Ham v. South Carolina Is Misplaced. All That Is Required Is A General Inquiry Into The Juror's General Views Concerning Obscenity.

Petitioner's reliance on Aldridge v. U.S., 282 U.S. 308 (1931) and Ham v. South Carolina, 409 U.S. 524 (1973) (Brief for Petitioner at page

5/ See footnote 2 at page 15, supra.

39) in support of its proposition that such voir dire inquiry is mandated by "the essential fairness required by the Due Process Clause" is misplaced. The same argument was advanced in Hamling v. U.S., 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887 (June 24, 1974) where the Federal District Court refused to ask certain questions on voir dire concerning possible religious and other biases of the jurors; specifically whether the jurors' educational, political, and religious beliefs might affect their views on the questions of obscenity. In rejecting the need for more than a general inquiry into the jurors' general views concerning obscenity, this Court said in Hamling v. U.S. at 139:

> "We agree with the Court of Appeals. Fed. Rule Crim. Proc. 24(a) permits a district court to conduct the voir dire examination, making such use of questions submitted by the parties as it deems proper. The District Court here asked questions similar to many of those submitted by petitioners, and its examination was clearly sufficient to test the qualifications and competency of the prospective jurors. Petitioners' reliance on this Court's decisions in Aldridge v. United States, 283 U.S. 308, 75 L.Ed. 1054, 51 S.Ct.

470, 73 A.L.R. 1203 (1931), and Ham v. South Carolina, 409 U.S. 524, 35 L.Ed.2d 46, 93 S.Ct. 848 (1973), is misplaced. Those cases held that in certain situations a judge must inquire into possible racial prejudices of the jurors in order to satisfy the demands of due process. But in Ham v. South Carolina, supra, we also rejected a claim that the trial judge had erred in refusing to ask the jurors about potential bias against beards, noting our inability 'to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices . . . .' Id., at 528, 35 L.Ed.2d 46. Here, as in Ham, the trial judge made a general inquiry into the jurors' general views concerning obscenity. Failure to ask specific questions as to the possible effect of educational, political, and religious biases did 'not reach the level of a constitutional violation,' ibid., nor was it error requiring the exercise of our supervisory authority over the administration of justice in the federal courts. We hold that the District Court acted within its discretion in refusing to ask the questions." (Our emphasis.)

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II

THE FEDERAL DISTRICT COURT DID NOT ERR IN REFUSING TO APPLY CHAPTER 725 OF THE IOWA CODE TO A CRIMINAL PROSECUTION INVOLVING THE FEDERAL POSTAL STATUTE AND USE OF THE MAILS, 18 U.S.C. SECTION 1461, NOR DID SUCH REFUSAL RENDER THE FEDERAL STATUTE UNCONSTITUTIONALLY VAGUE.

A. The Application Of 18 U.S.C. Section 1461 To The Use Of The Mails For The Intrastate Shipment Of Obscene Materials Is A Proper Exercise Of Federal Power.

Article I, section 8, clause 7 delegates to the federal government the exclusive power "to establish post offices and post roads" and to regulate the use of the same for both inter and intrastate purposes. Unlike the commerce power over obscene materials, which extends only to interstate transportation, the federal controls over postal matters encompass intrastate mailings as well. In Public Clearing House v. Coyne, 194 U.S. 497 (May 3, 1904), the extent of the postal power was described as follows, at page 506-508:

> "The constitutional principles underlying the administration of the Post Office Department were discussed in the opinion

> of the Court in Ex parte Jackson, 96 U.S. 727, in which we held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country; that Congress might designate what might be carried in the mails and what excluded, . . . In establishing such system Congress may . . . also refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, . . . it may . . . also forbid the delivery of letters to such persons or corporations as in its judgment are making use of the mails for the purpose of . . . the dissemination among its citizens of information of a character calculated to debauch the public morality. For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked. The same provision was by the same act extended to letters and circulars connected with lotteries and gift enterprises, the constitutionality

of which was upheld by this court in In re Rapier, 143 U.S. 110."

Ex Parte Jackson, 96 U.S. 727 (1877), which was referred to in Public Clearing House v. Coyne, supra, involved intrastate facts similar to those presented in the cause herein, except that the subject matter involved a lottery. There, an indictment was filed in the Circuit Court of the United States for the Southern District of New York, for knowingly and unlawfully depositing, on the 23rd of February 1877, at that district, in the mail of the United States, to be conveyed in it, a circular concerning a lottery offering prizes, enclosed in an envelope addressed to one J. Ketcham, at Gloversville, New York. A unanimous Court affirmed the conviction, holding at page 736:

"In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals. Thus, by the act of March 3, 1873, Congress declared 'that no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or

any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, where, or how, or of whom, or by what means, either of the things before mentioned may be obtained or made, nor any letter upon the envelope of which, or postal-card upon which indecent or scurrilous epithets may be written or printed, shall be carried in the mail; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore mentioned articles or things. . . . shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every offence, be fined not less than $100, nor more than $5,000, or imprisonment at hard labor not less than one year nor more than ten years, or both, in the discretion of the judge."

"All that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and

articles, and that any one who attempted to use it for that purpose should be punished. The same inhibition has been extended to circulars concerning lotteries, -- institutions which are supposed to have a demoralizing influence upon the people. There is no question before us as to the evidence upon which the conviction of the petitioner was had; nor does it appear whether the envelope in which the prohibited circular was deposited in the mail was sealed or left open for examination. The only question for our determination relates to the constitutionality of the act; and of that we have no doubt."

B. Although Chapter 725 Of The Iowa Code Failed To Impose Criminal Sanctions At The State Level Against Conduct Involving The Dissemination Of Matter To Adults Which Would Be Obscene Under Federal Standards, The Entire Expression Of The Legislature Is Not Clear. Amicus Submits Such Legislation Did Not And Could Not Prevent Government From Criminalizing Such Conduct At The Local Level And/Or Taking Action To Abate The Same Civilly As A Public Nuisance, Nor Did It Render Such Subject Matter Acceptable To The Contemporary Community Standards.

1. The pre-emption provision of Chapter 725 of the Iowa Code is ambiguous.

An examination of Chapter 725 of the Iowa Code (see pages 4-8, supra) reveals that Chapter 725 (House File 1102), by its very language, purports to legislate only as to material which is "obscene to minors". Section 725.1 provides as follows:

"725.1. Definitions. As used in this section and sections 725.2 to 725.10, unless the content otherwise requires:

1. 'Obscene material' is any material depicting or describing the genitals, sex acts, masturbation, excretory functions or sado-masochistic abuse which the average person, taking the material as a whole and applying contemporary community standards with respect to what is suitable for minors, would find appeals to the prurient interest and is patently offensive, and the material, taken as a whole lacks serious literary, scientific, political or artistic value." (Our emphasis).

The history of litigation in the minor's area demonstrates that the subject matter which is being regulated by Chapter 725, by definition, is not the same subject matter which was being

considered in Roth-Alberts, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957), but includes material which may have constitutional protection. Compare Butler v. Michigan, 352 U.S. 380, 1 L.Ed.2d 412, 77 S.Ct. 524 (Feb. 25, 1957). The constitutionality of that special type of legislation seems beyond doubt. See Sam Ginsberg v. New York, 390 U.S. 629, 20 L.Ed.2d 195, 88 S.Ct. 1274 (Apr. 22, 1968), where Justice Brennan in describing the nature of the case began his opinion as follows, at page 199:

> "This case presents the question of the constitutionality on its face of a New York criminal obscenity statute which prohibits the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults." (Our emphasis).

Compare Bookcase Inc. v. Broderick, 18 N.Y. 2d 71, 271 N.Y.S. 2d 947, appeal dismissed for want of a properly presented federal question, 385 U.S. 12 17 L.Ed.2d 11, 87 S.Ct. 81 (Oct. 10, 1966); New York v. Charles Tannenbaum, 18 N.Y. 2d 268, 274 N.Y.S. 2d 131, appeal dismissed as moot 388 U.S. 439, 18 L.Ed.2d 1300, 87 S.Ct. 2107 (June 12, 1967). Because of the inclusion

of subject matter which, under other circumstances, may be protected by the federal constitution in so far as distribution to adults is concerned, there is a logical reason for pre-emption to be exercised at the state level in relation to such subject matter.

Section 725.9, entitled "Uniform Application", (see page 7, supra) is clearly a pre-emptive provision but, in view of the definition section noted above, there is a serious question as to whether such preemption was meant to extend to anything beyond that class of materials which is "obscene to minors". See State of Washington v. J-R Distributing Inc., 82 Wash. 2d 584, 512 P.2d 1049, discussed hereinafter.

Had those who drafted the bill included an express pre-emption, with specific language, such as, "There shall be no regulation of material which is obscene to adults", it would be clear that the legislators who voted for the bill knew what they were voting for. Lacking such specific language, it is difficult to say just what each legislator had in mind, when he cast his vote, and whether he intended to vote on anything other than a minor's statute. It must be remembered that the Iowa Legislature did not voluntarily repeal the general obscenity statute - that was done by the Iowa Supreme

Court in State v. Wedelstedt, 213 N.W.2d 652 (Dec. 19, 1973), in reliance on this Court's decisions in Miller and Paris Adult Theatre I in June of 1973. (See footnote 2 at page 15, supra.)

2. Chapter 725 of the Iowa Code should be interpreted as not effecting an implied pre-emption, so as to avoid a constitutional confrontation.

In considering whether Chapter 725 of the Iowa Code does, in fact, come into collision with the Federal Postal Law, 18 U.S.C., section 1461, this Court must first decide whether section 725.9 must be construed in the manner urged by petitioner;[6/] namely, that section 725.9

6/ See Sutherland Statutory Construction, Vol. 2 § 37.04. "Interpretation of state statutes in the federal courts" at page 87:

> "But where the United States Constitution compels one interpretation to the exclusion of others of a state statute in order for it to be constitutional, federal courts will give it that interpretation on their own authority without awaiting a ruling by the state courts . . ."

The Binghamton Bridge, 3 Wall 70 U.S. 51, 18 L.Ed. 137 (1865), Illinois Central R. Co. v. Chicago, 176 U.S. 646, 44 L.Ed. 622, 20 S.Ct. 509 (1900); New York Rapid Transit Co. v. New York, 303 U.S. 573, 82 L.Ed. 1024, 58 S.Ct.

expresses an implied pre-emption, thereby setting a state public policy which legalized the traffic which was the subject of the federal indictment herein. On this issue, the decision by the Washington Supreme Court in State of Washington v. J-R Distributing Inc., 82 Wash.2d 548, 512 P.2d 1049 should be considered. In that case, involving the issue of repeal of general obscenity statute by implication (rather than pre-emption of general obscenity legislation by implication), that Court held that the criminal sanctions respecting adults, R.C.W.9.68.010, were not impliedly repealed[7/] by enactment of a

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721 (1938); Higgenbothan v. Baton Rouge, 306 U.S. 535, 83 L.Ed. 968, 59 S.Ct. 705 (1939), Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 87 L.Ed. 165, 63 S.Ct. 172 (1942); Commissioner of Internal Revenue v. Tower, 327 U.S. 280, 91 L.Ed. 670, 66 S.Ct. 532 (1946); New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U.S. 665, 95 L.Ed. 439, 70 S.Ct. 413 (1950).

7/ The presumption against implied repeal is expressed in Sutherland Statutory Construction, volume 1A, § 23.10. "Presumption against implied repeal" at page 231, as:

> "The presumption against implied repeals is classically founded upon the doctrine that the legislature is presumed to envision the whole body of the law when it enacts new legislation, and, therefore, if a repeal of the prior law is intended, expressly to designate the offending provisions rather than to leave the repeal to

minor's statute with similar preemptive language. R.C.W.9.68.050-9.68.120. In that regard, the Washington Supreme Court held, at page 1062:

> "Defendant argues that R.C.W. 9.68.010 has been superseded and impliedly repealed by R.C.W. 9.68.050-120. He points out that R.C.W. 9.68.010 was last amended in Laws of 1969, ch. 92 § 1, p. 261, whereas R.C.W. 9.68.120 was adopted subsequently in Laws of 1969, 1st Ex.Sess., ch. 256,

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arise by necessary implication from the later enactment. Still more basic, however, is the assumption that existing statutory and common law, as well as ancient law, is representative of popular will. As traditional and customary rules, the presumption is against their alteration or repeal. The presumption has been said to have special application to important public statutes of long standing."

Rationally, the same presumption should exist as to the public policy in support of a public statute of long standing which has been held by a court decision to be technically defective on constitutional grounds. In a number of states where the state obscenity statute has been struck as a result of this Court's rulings in Miller and Paris Adult Theatre I, a road block has been thrown up in the state legislatures by the various lobbies, to prevent passage of a general obscenity statute. Amicus submits that it would indeed be unfortunate if such inaction, such as has occurred in the Iowa state legislature, could be construed to prevent the local communities from taking corrective legislative action.

§§ 13-20, p. 2093. This is said to indicate a legislative intent to repeal the earlier enactment by the more recent one, although both were enacted in 1969. Thus, defendant contends, R.C.W. 9.68.050-120 is the exclusive method of dealing with the exhibition of materials falling within its purview, including 'obscene' material. We disagree.

First, there is nothing in the legislation itself to indicate that R.C.W. 9.68.050-120 amends or repeals R.C.W. 9.68.010. Second, repeal by implication is not favored. Before a legislative enactment will be found to have been impliedly repealed by a subsequent act, the later legislation must clearly be intended to supersede the prior act. Copeland Lumber Co. v. Wilkins, 75 Wash.2d 940, 454 P.2d 821 (1969). Third, if there is to be an implied repeal, the implication must be clear and necessary and the two acts must be so inconsistent with and repugnant to each other that they are irreconcilable and cannot both be given effect. State v. Crow, 22 Wash.2d 402, 156 P.2d 416 (1945); Copeland Lumber Co. v. Wilkins, supra. Such is not the case here.

Clearly, R.C.W. 9.68.050-120 evidences no legislative intent to impliedly repeal R.C.W. 9.68.010. Different conduct, persons and categories of materials are covered in the two legislative enactments. R.C.W. 9.68.050-120 specifically applies only to minors whereas R.C.W. 9.68.010 has general application. R.C.W. 9.68.050-120 recognizes that there is a difference between materials which will appeal to a minor's prurient interest in sex and those which will have a similar appeal to adults (covered by R.C.W. 9.68.010). Application of the later enactment is not broadened by use of the language 'the provisions of R.C.W. 9.68.050 through 9.68.120 shall be exclusive.' R.C.W. 9.68.120. Such language means only that the definitions and procedures set forth in R.C.W. 9.68.050-120 are exclusive insofar as minors are concerned, and, that the state has preempted the field in the area of material defined as 'erotic' to minors. Thus, there is no repeal by implication here.'" (Our emphasis).

3. The pre-emption which Petitioner urges would be unlawful, as depriving the citizens of the local communities in Iowa of a federally protected right to live in a community whose public morals, moral values and environment are free from the degrading and corrupting influences of patently hard-core pornography.

(a) The judiciary has a moral responsibility as the guardian of the people's morals.

If the petitioner is correct in construing Chapter 725 as effecting a total pre-emption by making such materials acceptable to the contemporary community standards and precluding the local governments in Iowa from taking any action, either legislatively by way of local ordinances, or judicially through the initiation of civil lawsuits to prevent and abate traffic in hard-core pornography, then such legislation at the state level is invalid on federal grounds, as depriving the citizens of the State of Iowa, as citizens of the United States, of their federal rights. To recognize a "pre-emption" under the above circumstances would deprive the citizens of the

State of Iowa of:

(1) due process of law and equal protection of the law;

(2) the police power and "home rule" authority which is inherent in municipal authority; and

(3) one of the fundamental rights essential to the concept of well-ordered liberty; namely, the right to enjoy "common decency" and to live in a community whose public morals, moral values and environment are free from the illegal, degrading and corrupting influences of such patently hard-core pornography.

It was long ago decided that the Courts in our Anglo-Saxon legal system are the guardians of the public morals. Rex v. Curl, 2 Strange 789 (1727) Sir Charles Sedley's case, 1 Sid 168. A state legislature may not restrain the governmental power to deal with vice. In Farmer v. Behmer, 100 P.901 at 904 the California Court of Appeals had the following to say in this regard:

> "It is a novel doctrine that the Legislature may empower a city by its charter to suspend the operation of general laws punishing crime. No one would for

a moment contend that murder, manslaughter, larceny, burglary, or any other of the long list of crimes punishable by statute could be condoned or palliated by an ordinance regulating or licensing such offenses. The heinousness or degree of the crime can make no difference. The statute punishing the keeping of a house of prostitution as a crime can no more be suspended in its operation than any other criminal statute. ..."

(b) Where commercial vice is involved, local government's power to abate the same is inherent, and plenary, and may not be interferred with.

> "The power to determine the question of what will injuriously affect the public is lodged with the legislative branch of the Government." Mugler v. Kansas, 123 U.S. 205 at 210 (Dec. 5, 1887).

A legislative act or judicial ruling which would restrict a municipality's police power to legislate on those matters considered necessary to safeguard public morality would constitute an unconstitutional abridgment of fundamental rights under the federal constitution. Mugler v. Kansas, 123 U.S. 205 at 210, 211. The argument

that petitioner makes (Brief for Petitioner at page 15) that this Court in Miller, by affirming the right of a State legislature to preclude localized community standards in favor of a state-wide standard, thereby "set a course specifically chartered by this Court", whereby the state legislature could mandate a standard that required the acceptance of hard-core pornography in every hamlet, village, and town, and foreclosed prohibitions by "other (local) government units within the state" carries that statement too far. See U.S. v. 12-200 Feet of Reels, 413 U.S. 123, 37 L.Ed.2d 500 at 505, 93 S.Ct. 2665, where this Court put a halt to just such an illogical extention:

> "The seductive plausability of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.'

> Perspectives may change, but our conclusion is that Stanley represents such a line of demarcation; and it is not unreasonable to assume that had it not been so delineated, Stanley would not be the law today."

This Court has many times recognized that a legislative body may not bargain away its power to protect public morals, nor excuse its failure to perform a public duty by saying it had been agreed, by legislative enactment, not to do so. In Stone v. Mississippi, 101 U.S. 814, (1879), this Court said, at page 819:

> "The question is therefore directly presented, whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation,

and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. Beer Company v. Massachusetts, supra."

In Douglas v. Kentucky, 168 U.S. 489 (1897), this Court again considered the public policy re public morals, above expressed in Stone v. Mississippi, supra; and therein commented, at page 505:

"In the same opinion it is well observed that, under any other doctrine than that announced in Stone v. Mississippi, the legislature, by giving or bartering away the power to guard and protect the public morals, could 'convert the State into dens of bawdy houses, gambling shops and other places of vice and demoralization, provided the grantees paid for the privileges, and thus deprive the State of its power to repeal the grants and all control of the subjects as far as the grantees are concerned, and the trust duty of protecting and fostering the honesty, health, morals and good order of the State would be cast to the winds, and vice and crime would triumph in their stead. Now, it seems to us that the

essential principles of self-preservation forbid that the Commonwealth should possess a power so revolting, because destructive of the main pillars of government.'"

See also Champion v. Ames, 188 U.S. 321, 23 S.Ct. 321, 356, 47 L.Ed. 492 (1903) commented on hereinafter at page 61.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973) Memoirs v. Massachusetts, 383 U.S. 413, 462 (1966) (White, J., dissenting) and U.S. v. Reidel, 402 U.S. 351, 357 (1971), which are relied upon by Petitioner (Brief for Petitioner at page 15), cannot be read in a manner which would place them at odds with the above stated legal principles. (See page 64, infra). Whereas, it is true that a State Legislature may choose by inaction not to legislate in the criminal (morals) area, it may not, by that inaction, foreclose the right of a local government such as a city, from applying the above principles re the moral law to that subject matter which the universal judgment of mankind says "should be restrained." U.S. v. Roth, 354 U.S. 476, 1 L. Ed.2d 1498, 1507, 77 S.Ct. 1304.[8/] Although "a

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8/ See the opinion of the Montana Supreme Court in U.S. Manufacturing and Distributing Corp. v. City of Great Falls, 546 P.2d 522 at 526 (Feb. 25, 1976) which suggests that a local community has an inherent right to act in this area.

municipal ordinance draws its authority from enabling legislation, the withdrawal of the authoritative enactment by specific provision or by implication of subsequent legislation upon the subject matter operates to repeal any ordinance which was dependant upon the repealed statute for its existence," the rule is otherwise "where a power is exercised by a municipality which is either within the sphere of its statutory authority" (i.e. public nuisance) or is a fundamental matter of local concern. See Sutherland Statutory Construction, Volume 1A, section 23.19. "Conflict between local ordinances and state statutes" at page 253 and the cases therein cited. See also Hamling v. U.S., 418 U.S. 87 at 105.

The power, which is being attacked herein, is one of the most basic powers of local government - the power possessed by local government in aid of its duty to protect the public morals of the local community against that type of public conduct which is regarded as being malum in se. In addressing himself to the public morals issue and the pre-eminent power of local government to control the same, Woods describes the danger as being in the nature of a "nuisance per se." See "The Law of Nuisances" by H. G. Wood, Sections 23 and 24, at pages 45-46:

"Section 23. Acts affecting public morals, public nuisances per se, when. - There are classes or kinds of businesses which are nuisances per se, and the very fact that they are carried on in a public place is prima facie sufficient to establish the offense. But in such cases, if the respondent questions that the use of his property in the manner charged in the indictment produces the effects set forth therein, and introduces evidence to sustain his position, it then becomes necessary to prove that the effects are such as are charged. But there are a class of nuisances arising from the use of real property and from one's personal conduct that are nuisances per se, irrespective of their results and location, and the existence of which only need to be proved in any locality, whether near to or far removed from cities, towns, or human habitations, to bring them within the purview of public nuisances. This latter class are those intangible injuries which affect the morality of mankind, and are in derogation of public morals and public decency."

"Section 24. Wrongs malum in se. - This class of nuisances are of that aggravated class of wrongs that, being malum in se,

the courts need no proof of their bad results and require none. The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promotion of evil manners, and anything that produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance." (Our emphasis.)

That municipal power is inherent in government itself and is so basic that its grant of authority is said to be "implied", and to flow from the Common Law rather than from "express" provisions in the City's Charter or the General Laws of the State. See "The Law of Nuisances," Woods, Section 743, at page 972:

"Section 743. No control over nuisances without special power. - Therefore, a municipal corporation has no control over nuisances existing within its corporate limits except such as is conferred upon it by its charter or by general law. There can be no question, however, but that where a nuisance exists within its corporate limits that is clearly a nuisance at common law or by statute, which is detrimental to the health of the inhabitants, it may be abated by the authorities, but it must

be a nuisance at common law and one which any person injured thereby might lawfully abate of his own motion, or in the absence of express or implied authority given, the removal or abatement of the nuisance would be unlawful. Where the thing abated is clearly a nuisance, and one which affects the health of the city, the abatement may be made by the authorities or by any person injured thereby. The common law in such a case comes in aid of the authorities, and they are justified in the act, not because they are officials of the city, but because they are citizens injured by the thing abated." (Our emphasis.)

Joyce, in his treatise "Law of Nuisance", Section 345, notes that this common law power entrusts the municipal corporation with not only the right but the obligation to remove the nuisance; at page 498:

"The rule is declared to be settled, without dissent, that, without a special grant of authority, public corporations may, as a common law power, cause the abatement of nuisances, and if the nuisance cannot otherwise be abated, may destroy the thing which constitutes it. And it is said that a municipal corporation has not only the right,

but is also under the obligation, to remove nuisances which may endanger the health of its citizens; that it has the power to decide in what manner this shall be done; and that its decision is conclusive unless it transcends the power conferred by the charter or violates the constitution."

The importance of this municipal power was stressed by the United States Supreme Court in James Phalen v. The Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850):

"The suppression of nuisances injurious to public health or morality is among the most important duties of government. . . It is a principle of the common law, that the king cannot sanction a nuisance. . . ."

C. Assuming That Chapter 725 Of The Iowa Code Was Intended To Effect A Pre-emption Which Would Guarantee The Unrestricted Distribution To Adults In Iowa Of Hard-core Pornography Which Under Federal Law Would Be Obscene, Such Legislation Would Be Invalid Because In Direct Conflict With Federal Law.

1. Such legislative action would be invalid being in conflict with Article I, Section 10 of the federal constitution. The State of Iowa may not legislate to encourage the dissemination of subject matter which the United States of America, by treaty, is required to discourage.

In Roth v. U.S., 354 U.S. 476 at 484 (June 21, 1957) this Court took notice of an existing international policy agreement:

"But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations,9/ ..."

9/ A copy of the 1911 "Agreement for the Suppression of the Circulation of Obscene Publications", 37 Stat 1511-1515, referred to by the Roth Court at footnote 15 is attached as Exhibit "D" to this Brief Amicus Curiae. In that treaty, the United States of America, as a signatory nation, expressed the national desire to repress "offenses connected with obscene publications", and entered into a mutual compact with other nations to that end.

In Hauenstein v. Lynham, 100 U.S. 483, 25 L.Ed. 628 (1879), this Court noted that the treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. When the conflict is between the provision of a treaty and a provision of a state statute the treaty supercedes prior conflicting state legislation, and cannot be restricted by later inconsistent state statutes. Sutherland Statutory Construction, Vol 1A, Section 23.22. "Conflict between statutes and treaties" at page 262.

A treaty cannot be the Supreme law of the land, that is of all of the United States, if an act of a State Legislature can stand in its way. Ware v. Hylton, 3 Dall. 199 (1746).

2. Such legislative action would be invalid under the "one people" concept regarding the federal police power.

The trial judge's ruling, that a federal jury, in deciding a case involving federal standards of obscenity, could totally disregard state law on the subject, was not "inconsistent with basic principles of federalism" as claimed by petitioner. (See Brief for Petitioner at page 18). The "one people" concept of federalism,

(see Hoke v. U.S., 27 U.S. 308 (Feb. 24, 1913), envisions the federal government as having been granted plenary power to control the mails and interstate commerce, and charged with the concomitant duty and responsibility of administering those controls, which have been established by their representatives at the national level, in a way which will safeguard the standards of public decency (morality) which are common to the individual State members of the compact. Under the "one people" concept the federal government has total control over subject matter as to which reasonable minds would not differ and all would hold to be pornographic (hard-core pornography).

(a) The "one people" concept.

Petitioner's dispute (Brief for Petitioner at page 18) with the Court of Appeal ruling that:

> "the fact that a law of a state permits a given kind of conduct does not necessarily mean that the people within the state approve of the permitted conduct."

and claim that the same is an "astounding statement" which "is repugnant to the political structure of a democratic republic", refuses to acknowledge the existence of the "one nation" concept which has been developed in aid of maintaining

good public morality. See Part XIV entitled "The 'One People' Concept,"[10/] appearing in "The Challenge of a Modern Federal Criminal Code Statement in the U. S. Senate by Senator John L. McClellan, March 11, 1971, in Hearings Before the

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10/ XIV. THE "ONE PEOPLE" CONCEPT. Between the Code of 1909 and the codification of 1948, a number of significant new Federal criminal offenses were enacted. Their significance can be best understood, however, by prefacing their consideration by a reference to Madison's conception of the scope of the powers of the Federal Government. In the Federalist No. 44, he observed:

The powers delegated by the proposed Constitution to the Federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiations, and foreign commerce; with last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state.

This limited conception of the role of the Federal Government stands in sharp contrast, of course, with what as a matter of history has come to pass. For example, in June, 1910, less than 6 months after the Code of 1909 went into effect, Congress passed the Mann Act, a provision against the "moral misuse" of the facilities of interstate commerce. (Act of June 25, 1910, c. 395, 36 Stat. 825.) In Hoke v. United States, 277 U.S. 308, 322 (1913), upholding the act, Mr. Justice McKenna employed expressions which, when considered, serve as a reminder that,

Subcommittee on Criminal Law and Procedures of the Committee on the Judiciary, United States Senate, Ninety-second Congress, First Session, Part 1," at p. 30. In Congress, the

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since 1872, Congress had been acting, intermittently, upon a principle foreign to Madison's that did not come into application until after the Civil War. He said:

"Our dual form of government has its perplexities . . . but it must be kept in mind that we are one people . . . and the powers (granted to the Federal government) . . . are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral."

The inference is plain. Lotteries, frauds, circulation of obscene literature, prostitution, narcotic addiction, all were, at first, well within what Madison had in mind when he commented that the powers reserved to the States extended to "all objects which, in the ordinary course of affairs, concern . . . the internal order, improvement, and prosperity of the state." The trouble was that it proved, as we became not only one people, but one nation, impossible for the States, under their own powers, effectually to preserve "internal order" in these matters when the facilities of the mails were seen to operate, in one fashion, and the privileges of interstate commerce, in another, to negate the efforts of any state to suppress what the people of the nation saw as national evils. In the judgment of many, these evils were pervasive throughout the whole nation. There were, moreover, Federal constitutional powers under which they could be attacked by the enactment of federal criminal legislation. From time to time, therefore, Congress made use of the powers assigned to the general government, singly or in combination, "to promote the general welfare, material and moral."

several states have assembled and established a comprehensive set of federal controls of obscenity over (1) importation from abroad, (2) use of the mails, (3) transportation in interstate commerce, and (4) international movement. In view of such federal legislation, it is difficult to understand petitioner's claim, (Brief for Petitioner at page 21) that the Iowa legislature has "conclusively determined the contemporary community standards." Amicus submits that such an argument gives the legislative action greater weight than it is entitled to under the "one people" concept of federalism.[11/]

11/ Further, Iowa law would not have the effect of "establishing" the contemporary community standards. (Brief for Petitioner at p.14.) Even though the decriminalization of dealing in obscenity might exist, the relevancy of Chapter 725 would still be in question where the State judiciary has not as yet answered the further question as to whether the state civil public nuisance statute can be implemented by local ordinances to allow civil abatement controls in this area. See Iowa ex rel. Faches v. N.D.D. Inc. d.b.a. Marion Adult Theater, 228 N.W.2d 191 (Apr. 16, 1973), discussed at footnote 2 on page 15 herein, and compare People ex rel. Busch et al. v. Projection Room Theater et al., 16 Cal. 3d 360, 546 P.2d 733, 128 Cal. Rptr. 229, vacated and new opinions substituted in 17 Cal.3d 42, 550 P.2d 600, 130 Cal.Rptr. 328 (June 1, 1976), petition for certiorari filed on Aug. 30, 1976 in Van de Kamp v. Projection Room Theater, No. 76-390 October Term 1976

Contrary to petitioner's arguments (Brief for Petitioner at pp. 17 and 24), obscenity is not "predominantly a matter of state interest." It is, under the "one people" concept, a matter of state and federal interest. Independent federal interests have been "identified" by this Court in the well-documented views of Justice Harlan. See, for example, Roth v. U. S., 354 U.S. at 497-498. Amicus submits that the foundation for Harlan's views are to be found in the "one people" concept. In granting such powers to the Federal government, it was the expectation of the compact States that the Federal government would administer those powers to suppress that subject matter which was considered by the States as a whole to be injurious to public morals, as declared by their representatives in federal legislation. See Champion v. Ames, 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903), where the court said at pp.

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with Pennsylvania v. MacDonald, 347 A.2d 290, petition for certiorari denied by this Court in 75-1073 on Oct. 4, 1976. Were this court to so hold, would preclude local government from making the argument--as yet unanswered--that a local community has a Federal right to keep hard-core pornography out of the neighborhood. The petitioner's argument that state law precludes any finding that the materials are "obscene" would necessitate a holding that the state legislature can pre-empt Federal law. (See Point IIC3 at page 65 infra.)

356 and 357:

"If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution . . . . But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals . . . As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people

of the United States against the 'widespread pestilence of lotteries' and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them — which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end . . . ." (Our emphasis.)

In enumerating his hard-core pornography rule limitation on federal power, Harlan was using as a common denominator that "bottom of the barrel" quality of material as to which it

might be said that reasonable minds would not differ, and could come to but one conclusion.[12/]

In Miller v. California et al., supra, this Court's obscenity decisions took a sharp turn in course from the direction in which they had been proceeding. Over night, all of the hurdles which had been constructed against law enforcement were removed and the pornographers awoke on June 21, 1973, to find themselves stripped of their defenses. In spite of the braking action which this Court has applied, the expected positive gains have not been achieved. Nor will they, until the conspicuous contradiction in those decisions is corrected.[13/]

12/ Conceptually speaking, obscenity might be visualized as a polluted liquid of varying densities contained within a barrel, with hard-core pornography, with the heaviest density, lying at the bottom of the barrel. Protected free speech can be visualized as that clear liquid which overflows and lies outside the barrel. That subject matter which lies inside the barrel and on top of the density layer which is "hard-core pornography" is non-protected subject matter, which states may legalize or proscribe in their discretion.

13/ This Court said in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 37 L.Ed.2d 446, 93 S.Ct. 2628, June 21, 1973:

> "The States, of course, may follow such a 'laissez faire' policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the place, but nothing in the Constitution compels the States to do so with regard to matters falling within state jurisdiction. . . ."

Surely this Court was not saying that hard-core pornography, which under federal law may not be imported; may not be placed in the mail, may have no property value, may not be copyrighted and which may not be sent interstate, can nevertheless be given a legal status and value within a state? What of the expression in Roth-Alberts, 354 U.S. 476, 485, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957) that it is the universal judgment of civilized nations as reflected in their international agreements, that obscenity should be restrained? Should not this Court explain that statement by recognizing the Harlan view expressed in Roth v. U.S., 354 U.S. 476, at 500, and admitting that what the court was talking about, in so far as States are concerned, was something which was specifically described, but less than hard-core pornography (reasonable men would not differ and could come to but one conclusion), and yet not quite protected speech.

3. Such legislative action would be invalid under the Supremacy Clause. On the question of whether hard-core pornography is to be tolerated, federal law has occupied the field.

When Congress exercises a granted power, the federal legislation may displace state law under the Supremacy Clause. Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23 (1824). Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229-230, 11

L.Ed. 1447, 67 S.Ct. 1146, 1151, 1152 (1947).

(a) The disposition of "hard-core pornography" inherently, is a matter for federal control:

In Congress assembled, the representatives of the several states have established a comprehensive set of federal controls on obscenity over (1) importation from abroad, (2) use of the mails, and (3) transportation in interstate commerce. See 18 U.S.C. Sections 1461-1465, 1735, 1737; 19 U.S.C. Section 1305. Those controls have been supplemented by treaty abroad. In a situation such as this, where the evidence clearly points to a total restraint on such hard-core pornography, the federal compact must prevail and preemption is clearly operative. While Congress has never established a definition of obscenity, it has not, as noted above, been silent about whether or not obscenity should be proscribed, cf. Justice Harlan's discussion of the category of obscenity, "hard-core pornography", and federal power in relation thereto, cited with approval in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 431, 93 S.Ct. 2607. As regards the category "hard-core pornography", see Justice Douglas speaking on pre-

emption in Campbell v. Hussey, 368 U.S. 297, 7 L.Ed.2d 299, 82 S.Ct. 327 at 301:

> "We do not have here the question whether Georgia's law conflicts with the federal law. Rather we have the question of pre-emption. Under the federal law there can be but one 'official' standard - one that is 'uniform' and that eliminates all confusion by classifying tobacco not by geographical origin but by its characteristics. In other words, our view is that Congress, in legislating concerning the types of tobacco sold at auction, pre-empted the field and left no room for any supplementary state regulation concerning those same types."

(b) The Congressional intent has been clearly stated that obscenity shall not be given a free reign.

Petitioners contention that Iowa state law, liberating obscenity, should be adopted because of the "silence of Congress". (See Brief for Petitioner at page 27) is completely unsupported by the factual evidence, and flies in the face of the Congressional finding of fact and declaration of policy in that body's Act of Oct. 3,

1967, Public Law 90-100 81 Stat. 253 (creating the Commission on Obscenity and Pornography) which held that the traffic in obscenity and pornography is a matter of national concern.

See Section 1 of Public Law 90-100 which provided:

> "Section 1. Finding of fact and declaration of policy. - The Congress finds that the traffic in obscenity and pornography is a matter of national concern. The problem, however, is not one which can be solved at any one level of government. The Federal Government has a responsibility to investigate the gravity of this situation and to determine whether such materials are harmful to the public, and particularly to minors, and whether more effective methods should be devised to control the transmission of such materials. The State and local governments have an equal responsibility in the exercise of their regulatory powers and any attempts to control this transmission should be a coordinated effort at the various governmental levels. It is the purpose of this Act (this note) to establish an advisory commission whose purpose shall be, after a thorough study which shall include a study of the causal relationship of such materials to antisocial

> behavior, to recommend advisable, appropriate, effective, and constitutional means to deal effectively with such traffic in obscenity and pornography."

See also, Senate Resolution No. 477, rejecting the findings and recommendations of the Commission on Obscenity and Pornography, which recommended the liberation of obscenity. (Congressional Record for October 13, 1970 at pages 36474-36478). The Petitioner's argument also runs contrary to this Court's recent clarification in Hamling v. U.S., 41 L.Ed.2d at 618 which delineated what Congress has proscribed by 18 U.S.C. Section 1461.

Contrary to Petitioner's argument (Brief for Petitioner at page 24), this court has not indicated, with regard to competing interests, that it recognized that the regulation of "obscenity" is predominantly a matter of state, not federal interest. In those cases cited by Petitioner at page 24, this court was addressing itself to the opposing interests of the Tenth Amendment to the Federal Constitution (which reserves to states the power to regulate obscenity) and the First Amendment (freedom of speech which traditionally resists such regulation.) The argument (Brief for Petitioner at page 31) that "this Court has rejected any

need for national uniformity" does not place this Court's remarks in their proper context. The solution therein arrived at was in response to the problem of how to find an accomodation between the opposing interests of the Tenth Amendment (state police power) and the First Amendment (free speech). That accommodation does not dispute or deny the national need to provide controls which aid in the individual state efforts to suppress obscenity. Amicus submits that this national need for uniformity can be met by regulating and proscribing at the national level that which lies at the bottom of the barrel (Harlan's view) as described in the Miller formulation and incorporated into 18 U.S.C. Section 1461 by Hamling v. U.S. (See Point IIC2(a) at page 57 supra.)

Petitioner argues at pages 16 and 17 of his brief that, (1) "the test does not vary between federal and state prosecutions", and at page 17 that (2) "the same 'contemporary community standards' should be applied in Federal as well as state prosecution". If those two principles must exist side by side, then it must necessarily follow that one or the other must control since one legislative standard (federal) criminalizes traffic in such matters whereas, the other (state) does

not.

The principle which petitioner urges that an individual should receive uniform treatment in the state of his residence and that the same act should not be governed by two different standards, (Brief for Petitioner at page 32) must be analyzed in its proper context. What petitioner seeks is an assurance that, while voluntarily engaging in a game of Russian Roulette, he will not be done in by a lethal bullet. The law does not give him that assurance. Nash v. U.S. 229 U.S. 373; U.S. v. Hamling, 418 U.S. at 124. So long as Petitioner operates in the mud, he is not entitled to the same considerations as those who reach for the stars. U.S. v. Raines, 362 U.S. 17.[14/] If, as Petitioner claims, the law is to be that the same act should not be governed

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14/ A distributor is subject to varying degrees of criminal liability in prosecutions by various states under the several obscenity statutes. He is also subject to varying degrees of criminal liability in prosecutions in various federal judicial districts. Hamling v. U.S., 418 U.S. 87, 41 L.Ed.2d 590, 614, 94 S.Ct. 2887 (June 24, 1974). Different juries may reach different results. It should do no violence to constitutional principles that a distributor may be subjected to criminal prosecution in the federal jurisdiction and not in the state system for the same geographical area, where the range of his conduct places him at the bottom of the barrel. See footnote 12 at page 64 supra.

by two different standards—one state and one federal—then the only answer under these circumstances must be that the state standard must give way. There is, however, a strong argument that there must be two standards of review, if Harlan's view is to be followed (See Point IIC2 at page 61 supra and footnote 12 on page 64.)

If there is a "potential conflict" between Iowa's decision to decriminalize (not, deregulate) the distribution of sexually related material within its borders and a prosecution under 18 U.S.C. Section 1461 for an intrastate mailing (See Brief for Petitioner at page 23), such cannot be "reconciled" by "deference" to Iowa law. That analysis would fly in the face of the common understanding in Constitutional law that the grant of federal power in the postal area is specific and plenary, and is excluded from control through the Tenth Amendment, being a power which is delegated to the United States. To accord that construction would not bring about a "reconciliation" or "flesh out the details", but rather would run contrary to the specific authorization of the Tenth Amendment, and frustrate the intent of a comprehensive pattern of federal legislation.

In sum, the bent of the federal law is

to proscribe hard-core pornography. Petitioner's argument at page 28 of his brief, that to disregard Chapter 725 of the Iowa Code is to nullify state law without (1) a clear statement of Congressional intent or (2) an inherently federal subject matter, is without merit. The complete answer to the former contentions is found in Public Law No. 90-100 and the enactment of a comprehensive pattern of federal obscenity statutes. The answer to the latter can be found in the "one people" concept relating to the nature of the federal police power. (See Point II C2 supra, at page 56).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Dated: October 15, 1976

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that on this __th day of October, 1976, copies of the within Brief Amicus Curiae of Citizens for Decency Through Law, Inc., an Ohio Corporation, in Support of Respondent United States of America were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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EXHIBIT A

Order (unreported) of U.S. District Judge W.C. Stuart, Southern District of Iowa, denying motion for new trial in

Reference: See Brief Amicus Curiae at pp. 1,16

IN THE UNITED STATES DISTRICT COURT,
Southern District of Iowa,

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JERRY LEE SMITH, d/b/a Intrigue,
Defendant.

Criminal No. 75-46.

ORDER.

On September 9, 1975, a federal jury found defendant Jerry Lee Smith d/b/a Intrigue guilty on seven counts of mailing obscene material in violation of 18 U. S. C. § 1461. The Court now has before it Mr. Smith's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure providing that a new trial may be granted "if required in the interest of justice". The Court however believes that the interest of justice does not so require in this situation, and the motion will be denied.

Defendant's motion is grounded upon the assertion that the Government has failed to sustain its burden of proof to show that the materials involved affronted contemporary community standards. Several reasons are given why this is claimed to be true. First, the Court's refusal to query, or allow counsel to query, prospective jurors as to their knowledge of any such standards, second, the absence of any evidence by the Government purporting to show what the proper standard is; and third, the Government's failure to show any violation of what defendant claims to be the binding standard in this regard—Chapter 725 of the Iowa Code. Defendant also argues that if the standards for the jurisdiction of this court are in fact different from the standard supposedly set forth in Chapter 725 of the Iowa Code,

a guilty verdict offends due process in that jurors were not questioned on the subject before being impaneled.

The Court will first consider the ramifications on this entire matter of the State of Iowa's decision not to regulate obscenity insofar as adults are concerned. Defendant implies that the contemporary community standard has thus been fixed and as such should be deemed controlling for purposes of a federal obscenity prosecution. Such an argument, however, assumes too much. We are dealing with a federal law which neither incorporates nor depends upon the laws of the states. *United States* v. *Hill* (5th Cir., 1974), 500 F. 2d 733. Although the Iowa legislature has chosen as a matter of policy to deregulate the dissemination of obscene materials, except where minors are involved, the federal government has not followed a similar course. Regardless of the state laws, federal proscriptions still remain upon the mailing of obscene materials. In an effort to formulate a workable definition of obscenity for use in federal prosecutions, a "contemporary community standard" has been included as an element thereof, but it does not inexorably follow that such standards are determined by what a state legislature has elected to tolerate. The fact that a state has chosen to permit a given kind of conduct does not necessarily mean that the people within that state approve of the permitted conduct. Whether they do is a question of fact to be resolved by the jury. (See the unpublished opinion of *United States* v. *Danley* (9th Cir., 1975), No. 75-1948.) Therefore, any arguments being advanced which are premised upon the controlling nature of the Iowa law in a federal prosecution must fail.

The Court is also unable to agree that the failure to elicit or have elicited from prospective jurors the extent of their knowledge of a contemporary community standard violated any of defendant's rights. A juror's role in cases of this character is revealed in the following passage from *Hamling* v. *United States*, (1974), 418 U. S. 87, 105:

> The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is

> to permit a juror sitting in obscenity cases to draw on knowledge of the community of vicinage from which he comes in deciding what conclusion the average person applying contemporary community standards would reach in a given case.

A contemporary community standard, by its very nature, is a varying concept. Clearly, it is the intended province of the jury to determine that standard and apply it to the facts of a given situation. Instructions were given at the close of the evidence in this case as to what constitutes a contemporary community standard and how such a standard is to be discerned. This, the Court believes, is all the law demands under the circumstances. To require the disclosure of a prospective juror's knowledge in this respect is no more required than would pretrial disclosure of a juror's concept of "reasonableness" be necessary where that standard is an essential element.

Lastly, the Court cannot agree that the Government need introduce evidence of a community standard to sustain its burden of proof. As the Supreme Court has stated, "in the cases in which this Court has decided obscenity questions since *Roth* [*Roth* v. *United States*, 354 U. S. 476], it has regarded the materials as sufficient in themselves for the determination of the question". *Ginzburg* v. *United States* (1966), 383 U. S. 463, 465. The materials introduced by the Government in the trial of this case can and do speak for themselves. See also, *United States* v. *Manarite* (2d Cir., 1971), 448 F. 2d 583 and *United States* v. *Wild* (2d Cir., 1970), 422 F. 2d 34.

In view of the foregoing analysis, It is Hereby Ordered that the motion of defendant Jerry Lee Smith d/b/a Intrigue for new trial be denied.

Signed this 14 day of October, 1975.

/s/ W. C. STUART,
W. C. Stuart,
U. S. District Judge Southern District of Iowa.

EXHIBIT B

Per curiam opinion of the United States Court of Appeals for the Eighth Circuit, affirming the judgment of conviction in JERRY LEE SMITH v. U.S. . . . . B-1 through B-3

Reference: See Brief Amicus Curiae at pp. 1, 17.

UNITED STATES COURT OF APPEALS,
For the Eighth Circuit.

No. 75-1802.

JERRY LEE SMITH, d/b/a INTRIGUE, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

} Appeal from the United States District Court for the Southern District of Iowa.

Submitted: January 15, 1976
Filed: February 13, 1976

Before CLARK, *Associate Justice,* Retired,* BRIGHT and HENLEY, *Circuit Judges.*

PER CURIAM:

Jerry Lee Smith was convicted in the United States District Court for the Southern District of Iowa on seven counts of placing non-mailable matter in the United States mails in violation of 18 U. S. C. §§ 1461-2 and was sentenced to three years imprisonment on each count to run concurrently, all of which was suspended except for six months. On this appeal

* Associate Justice Tom C. Clark, United States Supreme Court, Retired, sitting by designation.

Smith asserts two errors by the trial court: (1) In refusing to ask or permit counsel to ask certain questions of the jury panel as to the contemporary community standards existing in the Southern District of Iowa relative to the depiction of sex and nudity in magazines and books; and (2) in not applying Iowa law in the determination of the contemporary community standards applicable to the case.

1. The questions that Smith wished propounded to the jury panel have to do with the juror's knowledge of the contemporary community standards existing in the Southern District of Iowa; where he acquired such information; his understanding of what the contemporary community standards are; if, in arriving at such understanding, he took into consideration the laws of the State of Iowa regulating obscenity; and finally, what is his understanding of those laws.

In support of his contention that he had a right to propound such questions to the jury panel on voir dire, Smith seems to say that as a matter of due process he has a "right to inquire of the juror what 'contemporary community standards' the juror has knowledge of, if any, and just which of the multiple 'contemporary community standards' the juror will apply to him, and the nature of the 'contemporary community standards' which the juror believes have application to him." But it is for the jury under the instructions of the trial judge to determine whether the material under scrutiny, taken as a whole, appeals to the prurient interest; whether it depicts sexual conduct in a patently offensive way; and, finally, if taken as a whole, it lacks serious literary, artistic, political or scientific value. But this definition of obscenity is "one of law * * * a legal term of art," *Hamling* v. *United States*, 418 U. S. 87, 118 (1974), not one of fact. Jurors pass on facts, not law. The juror reaches his verdict by applying the definition of obscenity given him by the judge to the facts introduced into evidence, on a contemporary community standard. He draws on his own knowledge as to the views of the average person in the community, just as he does when he determines the propensities of the "reasonable" or

"average" person in other areas of decision making. Jurors do not have such standards on their tongues; nor do they wear them on their sleeves; they are inborn and often undefinable.

This is not to say that no questions can be asked the jury panel in this area, but only that the specific ones tendered here were impermissible. They smacked of the law, of casuistry, of the ultimate question of guilt or innocence, rather than the qualifications to serve as a juror, bias, etc.

2. This case appears to be controlled by *United States* v. *Danley*, 523 F. 2d 369 (9th Cir. 1975), and *United States* v. *Hill*, 500 F. 2d 733 (5th Cir. 1974); and the Supreme Court of the United States has passed on the second question in *Hamling* v. *United States*, 418 U. S. 87 (1974), where the Chief Justice wrote:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination.

This prosecution deals with a federal statute and state law has no bearing on its decision. On the contrary, the federal statute depends on federal law as laid down by the Supreme Court. It has incorporated contemporary community standards in the determination of obscenity. In this connection we note that the trial court admitted into evidence a copy of Iowa's obscenity statute. This was done so the jury might have the knowledge of the state's policy on obscenity when it determined the contemporary community standard. However, state policy was not controlling since the determination was for the jury, not the state. The jury could have followed state policy if it found that it was the contemporary community standard; but it did not so find as it had a right to do. We are bound by the jury decision.

AFFIRMED.

EXHIBIT C

Newsarticle of Des Moines, Iowa "Register", dated May 21, 1976, reporting on action of conference committee striking the controls which were to be imposed upon the sale of pornographic materials to adults from the proposed revision of the Iowa Criminal Laws. C-1

Reference: See Brief Amicus Curiae at pp. 15-16, fn.2

CURBS ON SALE OF PORNOGRAPHY ARE VOTED DOWN

By JOHN HYDE
Register Staff Writer

Control over the sale of pornographic materials to adults was scratched from the proposed revisions of Iowa's criminal laws late Thursday night by a conference committee of the Iowa Legislature.

The committee took the action despite votes in both the House and Senate favoring some type of control of pornographic materials in Iowa.

Although conference committee reports traditionally are not amended by the full House or Senate, the committee's action is certain to spark controversy when the criminal code is debated next week in the Senate and House.

"In a Free Society..."

Senator Gene Glenn (Dem., Ottumwa) argued strongly against reviving obscenity laws for adults in Iowa, saying, "In a free society, it is my strong belief that an individual should be able to read what he chooses to read and see what he chooses to see."

Glenn said standards for the control of obscenity would rest on "subjective judgment," and he added, "those who would today say that I may now view hard-core pornography because it is immoral would tomorrow say that I may not view soft-core pornography because it is immoral.

"Therein is the ultimate danger of legislation in this area," he said.

The House has passed, with only seven dissenting votes, an amendment banning the sale or display of materials depicting sado-masochism, bestiality, child molestation and excretory functions.

"We have to recognize that there is very strong public opinion in the State of Iowa that there should be some restriction on the very hard-core pornography," said Representative Terry Branstad (Rep., Lake Mills).

Fears Influence

Branstad expressed concern that persons seeing or reading such pornographic materials might be influenced to engage in such acts.

"You'd have to convice me that the people who attend these movies or see these things were unaware that they exist," responded Representative Brice Oakley (Rep., Clinton).

Oakley noted that the Legislature had not acted to prevent consenting adults from participating in whatever sexual activities they wish, but the proposed obscenity law would prohibit their looking at pictures of such acts.

And Representative Norman Jesse (Dem., Des Moines) said the fear that criminal behavior would result from pornography is based on "false assumptions."

He cited statistics showing that the number of sex crimes in Denmark dropped markedly after censorship was relaxed in that country.

The Senate refused to adopt the House-passed amendment, but it did adopt an amendment prohibiting the general display of similar types of materials.

The Senate amendment, although technically flawed, would have limited the sale of certain types of pornographic materials to adult bookstores and movie houses.

The House-Senate conference committee rejected the Senate version, 8 to 2, and the House version, 6 to 4.

Attempts Modification

Branstad then attempted to modify the House amendment to allow local governments to establish obscenity controls, but that received only three votes.

"Whatever we do or do not do, we ought not to have a hodge-podge of 900-some communities and 99 counties establishing their own standards," said Jesse.

On the motion of Des Moines Republican Julia Gentleman, the committee voted to return to the language contained in the original criminal code bill before it was amended by the House or Senate.

The original bill, like Iowa's current obscenity law, prohibits the sale of pornographic materials to minors, but it allows adults to buy or see whatever they choose.

EXHIBIT D

Reference: Roth-Alberts, 354 U.S. 485, fn.15
Brief Amicus Curiae at p. 55, fn.9

Arrangement between the United States and other Powers relative to the repression of the circulation of obscene publications. Signed at Paris, May 4, 1910; ratification advised by the Senate, January 18, 1911; ratified by the President, February 4, 1911; ratification of the United States deposited with the Government of the French Republic March 15, 1911; proclaimed, April 18, 1911.

May 4, 1910.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Repression of obscene publications. Preamble.

Whereas an Arrangement between the United States of America and Germany, Austria-Hungary, Belgium, Brazil, Denmark, Spain, France, Great Britain, Italy, The Netherlands, Portugal, Russia, and Switzerland relative to the suppression of the circulation of obscene publications, was concluded and signed by their respective Plenipotentiaries at Paris, on the fourth day of May, one thousand nine hundred and ten, the original of which Arrangement, being in the French language, is word for word as follows:

[Translation.]

ARRANGEMENT RELATIF À LA RÉPRESSION DE LA CIRCULATION DES PUBLICATIONS OBSCÈNES.	ARRANGEMENT RELATIVE TO THE REPRESSION OF THE CIRCULATION OF OBSCENE PUBLICATIONS.
Les Gouvernements des Puissances désignées ci-après, également désireux de faciliter, dans la mesure de leurs législations respectives, la communication mutuelle de renseignements en vue de la recherche et de la répression des délits relatifs aux Publications obscènes, ont résolu de conclure un Arrangement à cet effet et ont, en conséquence, désigné leurs Plénipotentiaires qui se sont réunis en Conférence, à Paris, du 18 avril au 4 mai 1910, et sont convenus des dispositions suivantes:	Contracting Powers. The Governments of the Powers hereinbelow named, equally desirous of facilitating within the scope of their respective legislation, the mutual interchange of information with a view to tracing and repressing offences connected with obscene publications, have resolved to conclude an arrangement to that end and have, in consequence, designated their plenipotentiaries who met in conference at Paris from April 18 to May 4, 1910, and agreed on the following provisions:
ARTICLE PREMIER.	ARTICLE 1.
Chacun des Gouvernements contractants s'engage à établir ou à désigner une autorité chargée:	Authority to be established. Each one of the Contracting Powers undertakes to establish or designate an authority charged with the duty of
1° De centraliser tous les renseignements pouvant faciliter la recherche et la répression des actes constituant des infractions à leur législation interne en matière d'écrits, dessins, images ou objets	Duties. (1) Centralizing all information which may facilitate the tracing and repressing of acts constituting infringements of their municipal law as to obscene writings, drawings, pictures or articles, and

obscènes, et dont les éléments constitutifs ont un caractère international;

2° De fournir tous renseignements susceptibles de mettre obstacle à l'importation des publications ou objets visés au paragraphe précédent comme aussi d'en assurer ou d'en accélérer la saisie, le tout dans les limites de la législation interne;

3° De communiquer les lois qui auraient déjà été rendues ou qui viendraient à l'être dans leurs États, relativement à l'objet du présent Arrangement.

Notification to contracting Governments.

Les Gouvernements contractants se feront connaître mutuellement, par l'entremise du Gouvernement de la République française, l'autorité établie ou désignée conformément au présent article.

ART. 2.

Direct correspondence.

L'autorité désignée à l'article 1er aura la faculté de correspondre directement avec le service similaire établi dans chacun des autres États contractants.

ART. 3.

Communication of bulletins.

L'autorité désignée à l'article 1er sera tenue, si la législation intérieure de son pays ne s'y oppose pas, de communiquer les bulletins des condamnations prononcées dans ledit pays aux autorités similaires de tous les autres États contractants, lorsqu'il s'agira d'infractions visées par l'article 1er.

ART. 4.

Adhesion of other Powers.

Les États non signataires sont admis à adhérer au présent Arrangement. Ils notifieront leur intention à cet effet par un acte qui sera déposé dans les archives du Gouvernement de la République française. Celui-ci en enverra, par la voie diplomatique, copie certifiée conforme à chacun des États contractants et les avisera, en même temps, de la date du dépôt.

the constitutive elements of which bear an international character.

(2) Supplying all information tending to check the importation of publications or articles referred to in the foregoing paragraph and also to insure or expedite their seizure all within the scope of municipal legislation.

(3) Communicating the laws that have already been or may subsequently be enacted in their respective States in regard to the object of the present Arrangement.

The Contracting Governments shall mutually make known to one another, through the Government of the French Republic, the authority established or designated in accordance with the present Article.

ARTICLE II.

The authority designated in Article I shall be empowered to correspond directly with the like service established in each one of the other Contracting States.

ARTICLE III.

The authority designated in Article I shall be bound, if there be nothing to the contrary in the municipal law of its country, to communicate bulletins of the sentences passed in the said country to the similar authorities of all the other Contracting States in cases of offences coming under Article I.

ARTICLE IV.

Non-Signatory States will be permitted to adhere to the present Arrangement. They shall notify their intention to that effect by means of an instrument which shall be deposited in the archives of the Government of the French Republic. The said Government shall send through diplomatic channel a certified copy of the said instrument to each one of the Contracting States and shall at the same time apprize them of the date of deposit.

Six mois après cette date, l'Arrangement entrera en vigueur dans l'ensemble du territoire de l'État adhérent, qui deviendra ainsi État contractant.

ART. 5.

Le présent Arrangement entrera en vigueur six mois après la date du dépôt des ratifications.

Dans le cas où l'un des États contractants le dénoncerait, cette dénonciation n'aurait d'effet qu'à l'égard de cet État.

La dénonciation sera notifiée par un acte qui sera déposé dans les archives du Gouvernement de la République française. Celui-ci en enverra, par la voie diplomatique, copie certifiée conforme à chacun des États contractants et les avisera en même temps de la date du dépôt.

Douze mois après cette date, l'Arrangement cessera d'être en vigueur dans l'ensemble du territoire de l'État qui l'aura dénoncé.

ART. 6.

Le présent Arrangement sera ratifié, et les ratifications en seront déposées à Paris dès que six des États contractants seront en mesure de le faire.

Il sera dressé de tout dépôt de ratifications un procès-verbal, dont une copie, certifiée conforme, sera remise, par la voie diplomatique, à chacun des États contractants.

ART. 7.

Si un État contractant désire la mise en vigueur du présent Arrangement dans une ou plusieurs de ses colonies, possessions ou circonscriptions consulaires judiciaires, il notifiera son intention à cet effet par un acte qui sera déposé dans les archives du Gouvernement de la République française. Celui-ci en enverra, par la voie diplomatique, copie certifiée conforme à chacun des États contractants et les avisera, en même temps, de la date du dépôt.

Six months after that date the Arrangement will go into effect throughout the territory of the adhering State which will thereby become a Contracting State.

ARTICLE V.

Effect.

The present Arrangement shall take effect six months after the date of deposit of the ratifications.

Denunciation by one Power.

In the event of one of the Contracting States denouncing it, the denunciation would only have effect in regard to that State.

The denunciation shall be notified by an instrument which shall be deposited in the archives of the Government of the French Republic. The said Government shall send through the diplomatic channel a certified copy thereof to each one of the Contracting States and at the same time apprize them of the date of deposit.

Twelve months after that date the Arrangement shall cease to be in force throughout the territory of the denouncing State.

ARTICLE VI.

Ratification.

The present Arrangement shall be ratified and the ratifications shall be deposited at Paris as soon as six of the Contracting States shall be in position to do so.

A procès verbal of every deposit of ratifications shall be drawn up and a certified copy thereof shall be delivered through the diplomatic channel to each one of the Contracting States.

ARTICLE VII.

Enforcement in colonies, etc.

Should a Contracting State wish to enforce the present Arrangement in one or more of its colonies, possessions or consular court districts, it shall notify its intention to that effect by an instrument which shall be deposited in the archives of the Government of the French Republic. The said Government shall send through the diplomatic channel a certified copy to each one of the Contracting States and at the same time apprize it of the date of the deposit.

Six mois après cette date, l'Arrangement entrera en vigueur dans les colonies, possessions ou circonscriptions consulaires judiciaires visées dans l'acte de notification.

La dénonciation de l'Arrangement par un des États contractants pour une ou plusieurs de ses colonies, possessions ou circonscriptions consulaires judiciaires s'effectuera dans les formes et conditions déterminées à l'alinéa 1er du présent article. Elle portera effet douze mois après la date du dépôt de l'acte de dénonciation dans les archives du Gouvernement de la République française.

Six months after that date the Arrangement shall go into effect in the colonies, possessions or consular court districts specified in the instrument of notification.

The denunciation of the Arrangement by one of the Contracting States in behalf of one or more of its colonies, possessions or consular court districts will be effected in the form and under the conditions set forth in the first paragraph of this Article. It will become operative twelve months after the date of the deposit of the instrument of denunciation in the archives of the Government of the French Republic.

ART. 8.

ARTICLE VIII.

Date of signature.

Le présent Arrangement, qui portera la date du 4 mai 1910, pourra être signé à Paris, jusqu'au 31 juillet suivant, par les Plénipotentiaires des Puissances représentées à la Conférence relative à la répression de la circulation des Publications obscènes.

Fait à Paris, le quatre mai mil neuf cent-dix, en un seul exemplaire, dont une copie conforme sera délivrée à chacun des Gouvernements signataires.

The present Arrangement which will bear date of May 4, 1910, may be signed at Paris until the following 31st of July by the Plenipotentiaries of the Powers represented at the Conference relative to the repression of the circulation of obscene publications.

Done at Paris, the fourth day of May one thousand nine hundred and ten in a single copy of which a certified copy shall be delivered to each one of the signatory Powers.

Pour l'Allemagne:
Signé:
(L. S.) ALBRECHT LENTZE.
(L. S.) CURT JOËL.

For Germany:
Signed
(L. S.) ALBRECHT LEUTZE.
(L. S.) CURT JOEL.

Pour l'Autriche et pour la Hongrie:
Signé:
(L. S.) A. NEMES,
Chargé d'Affaires d'Autriche-Hongrie.

For Austria and Hungary:
Signed
(L. S.) A. NEMES,
Chargé d'Affaires of Austria-Hungary.

Pour l'Autriche:
Signé:
(L. S.) J. EICHHOFF,
Conseiller de Section Imperial Royal autrichien.

For Austria:
Signed
(L. S.) J. EICHHOFF,
Austrian Imperial and Royal Section Counselor.

Pour la Hongrie:
Signé:
(L. S.) G. LERS,
Conseiller ministeriel Royal hongrois.

For Hungary:
Signed
(L. S.) G. LERS,
Hungarian Royal Ministerial Counselor.

Pour la Belgique:
Signé:
(L. S.) JULES LEJEUNE.
(L. S.) ISIDORE MAUS.

For Belgium:
Signed
(L. S.) JULES LEJEUNE.
(L. S.) ISIDORE MAUS.

Pour le Brésil:
Signé:
(L. S.) J.C. DE SOUZA BANDEIRA.

For Brazil:
Signed
(L. S.) J.C. DE SOUZA BANDEIRA.

Pour le Danemark:
Signé:
(L. S.) C. E. COLD.

For Denmark:
Signed
(L. S.) C. E. COLD.

Pour l'Espagne:
Signé:
(L. S.) OCTAVIO CUARTERO.

For Spain:
Signed
(L. S.) OCTAVIO CUARTERO.

Pour les États-Unis:
Signé:
(L. S.) A. BAILLY-BLANCHARD.

For the United States:
Signed
(L. S.) A. BAILLY-BLANCHARD.

Pour la France:
Signé:
(L. S.) R. BÉRENGER.

For France:
Signed
(L. S.) R. BÉRENGER.

Pour la Grande-Bretagne:
Signé:
(L. S.) E. W. FARNALL.
(L. S.) F. S. BULLOCK.
(L. S.) G. A. AITKEN.

For Great Britain:
Signed
(L. S.) E. W. FARNALL.
(L. S.) F. S. BULLOCK.
(L. S.) G. A. AITKEN.

Pour l'Italie:
Signé:
(L. S.) J. C. BUZZATTI.
(L. S.) GEROLAMO CALVI.

For Italy:
Signed
(L. S.) J. C. BUZZATTI.
(L. S.) GEROLAMO CALVI.

Pour les Pays-Bas:
Signé:
(L. S.) A. DE STUERS.
(L. S.) RETHAAN MACARE.

For the Netherlands:
Signed
(L. S.) A. DE STUERS.
(L. S.) RETHAAN MACARE.

Pour le Portugal:
Signé:
(L. S.) COMTE DE SOUZA ROZA.

For Portugal:
Signed
(L. S.) COUNT DE SOUZA ROZA.

Pour la Russie:
Signé:
(L. S.) ALEXIS DE BELLEGARDE.
(L. S.) WLADIMIR DÉRUGINSKY.

For Russia:
Signed
(L. S.) ALEXIS DE BELLEGARDE.
(L. S.) WLADIMIR DERUGINSKY.

Pour la Suisse:
Signé:
(L. S.) LARDY.

For Switzerland:
Signed
(L. S.) LARDY.

Pour copie certifiée conforme:
Le Ministre Plénipotentiaire, Chef du Service du Protocole,
ARMAND MOLLARD.

Ratifications deposited.

And whereas, the said Arrangement has been duly ratified by the Governments of the United States, Germany, Belgium, Spain, France, Great Britain, Italy, and Switzerland, and the ratifications of the said Governments were, as provided for by Article 6 of the said Arrangement, deposited by their respective Plenipotentiaries with the Government of the French Republic on March 15, 1911;

Ante, p. 1513.

Proclamation.

Now, therefore, be it known that I, William Howard Taft, President of the United States of America, have caused the said Arrangement to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this thirteenth day of April in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States of America the one hundred and thirty-fifth.

[SEAL]

WM H TAFT

By the President:
P C KNOX
Secretary of State.